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NO. 1.

THE HISTORY OF ASSUMPSIT.

I. — EXPRESS ASSUMPSIT.

THE mystery of consideration has possessed a peculiar fascination for writers upon the English Law of Contract. No fewer than three distinct theories of its origin have been put forward within the last eight years. According to one view, "the requirements of consideration in all parol contracts is simply a modified generalization of *quid pro quo* to raise a debt by parol."¹ On the other hand, consideration is described as "a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the common law."² A third learned writer derives the action of assumpsit from the action on the case for deceit, the damage to the plaintiff in that action being the forerunner of the "detriment to the promisee," which constitutes the consideration of all parol contracts.³

To the present writer⁴ it seems impossible to refer consideration to a single source. At the present day it is doubtless just and expedient to resolve every consideration into a detriment to the promisee incurred at the request of the promisor. But this definition of consideration would not have covered the cases of the six-

¹ Holmes, Early English Equity, 1 L. Q. Rev. 171; The Common Law, 285. A similar opinion had been previously advanced by Professor Langdell. Contracts, § 47.

² Salmond, History of Contract, 3 L. Q. Rev. 166, 178.

³ Hare, Contracts, Ch. VII. and VIII.

⁴ It seems proper to say that the substance of this article was in manuscript before the appearance of Judge Hare's book or Mr. Salmond's Essay.

teenth century. There were then two distinct forms of consideration: (1) detriment; (2) a precedent debt. Of these detriment was the more ancient, having become established, in substance, as early as 1504. On the other hand, no case has been found recognizing the validity of a promise to pay a precedent debt before 1542. These two species of consideration, so different in their nature, are, as would be surmised, of distinct origin. The history of detriment is bound up with the history of special *assumpsit*, whereas the consideration based upon a precedent debt must be studied in the development of *indebitatus assumpsit*. These two forms of *assumpsit* will, therefore, be treated separately in the following pages.

The earliest cases in which an *assumpsit* was laid in the declaration were cases against a ferryman who undertook to carry the plaintiff's horse over the river, but who overloaded the boat, whereby the horse was drowned;¹ against surgeons who undertook to cure the plaintiff or his animals, but who administered contrary medicines or otherwise unskilfully treated their patient;² against a smith for laming a horse while shoeing it;³ against a barber who undertook to shave the beard of the plaintiff with a clean and wholesome razor, but who performed his work negligently and unskilfully to the great injury of the plaintiff's face;⁴ against a carpenter who undertook to build well and faithfully, but who built unskilfully.⁵

In all these cases, it will be observed, the plaintiff sought to recover damages for a physical injury to his person or property caused by the active misconduct of the defendant. The statement of the *assumpsit* of the defendant was for centuries, it is true, deemed essential in the count. But the actions were not originally, and are not to-day, regarded as actions of contract. They have always sounded in tort. Consideration has, accordingly, never played any part in the declaration. In the great majority of

¹ Y. B. 22 Ass. 94, pl. 41.

² Y. B. 43 Ed. III. 6, pl. 11; 11 R. II. Fitz. Ab. Act. on the Case, 37; Y. B. 3 H. VI. 36, pl. 33; Y. B. 19 H. VI. 49, pl. 5; Y. B. 11 Ed. IV. 6, pl. 10; Powtuary v. Walton, 1 Roll. Ab. 10, pl. 5; Slater v. Baker, 2 Wils. 359; Sears v. Prentice, 8 East, 348.

³ Y. B. 46 Ed. III. 19, pl. 19; Y. B. 12 Ed. IV. 13, pl. 9 (*semble*).

⁴ 14 H. VII. Rast. Ent. 2, b. 1.

⁵ Y. B. 11 H. IV. 33, pl. 60; Y. B. 3 H. VI. 36, pl. 33; Y. B. 20 H. VI. 34, pl. 4; Y. B. 21 H. VI. 55, pl. 12; 18 H. VII. Keilw. 50, pl. 4; 21 H. VII. Keilw. 77, pl. 25; Y. B. 21 H. VII. 41, pl. 66; Coggs v. Bernard, 2 Ld. Ray. 909, 920; Elsee v. Gattward, 5 T. R. 143. See also Best v. Yates, 1 Vent. 268.

the cases and precedents there is no mention of reward or consideration. In *Powtuary v. Walton*¹ (1598), a case against a farrier who undertook to cure the plaintiff's horse, and who treated it so negligently and unskilfully that it died, it is said: "Action on the case lies on this matter without alleging any consideration, for his negligence is the cause of the action, and not the *assumpsit*." The gist of the action being tort, and not contract, a servant,² a wife,³ or a child,⁴ who is injured, may sue a defendant who was employed by the master, the husband, or the father. Wherever the employment was not gratuitous, and the employer was himself the party injured, it would, of course, be a simple matter to frame a good count in contract. There is a precedent of *assumpsit* against a farrier for laming the plaintiff's horse.⁵ But in practice *assumpsit* was rarely, if ever, resorted to.

What, then, was the significance of the *assumpsit* which appears in all the cases and precedents, except those against a smith for unskilful shoeing? To answer this question it is necessary to take into account a radical difference between modern and primitive conceptions of legal liability. The original notion of a tort to one's person or property was an injury caused by an act of a stranger, in which the plaintiff did not in any way participate. A battery, an asportation of a chattel, an entry upon land, were the typical torts. If, on the other hand, one saw fit to authorize another to come into contact with his person or property, and damage ensued, there was, without more, no tort. The person injured took the risk of all injurious consequences, unless the other expressly assumed the risk himself, or unless the peculiar nature of one's calling, as in the case of the smith, imposed a customary duty to act with reasonable skill. This conception is well shown by the remarks of the judges in a case against a horse-doctor.⁶ Newton, C.J.: "Perhaps he applied his medicines *de son bon gré*, and afterwards your horse died; now, since he did it *de son bon gré*, you shall not have an action. . . . My horse is ill, and I come to a horse-doctor for advice, and he tells me that one of his horses had a similar trouble, and that he applied a certain medicine, and that he will do the same for my horse, and does so, and the horse

¹ 1 Roll. Ab. 10, pl. 5. See also to the same effect, Reg. Br. 105 b.

² *Everard v. Hopkins*, 2 Bulst. 332. ³ *Pippin v. Sheppard*, 11 Price, 400.

⁴ *Gladwell v. Steggall*, 5 B. N. C. 733.

⁵ 2 Chitty, Pl. (7 ed.) 458.

⁶ Y. B. 19 H. VI. 49, pl. 5.

dies ; shall the plaintiff have an action? I say, No." Paston, J. : "You have not shown that he is a common surgeon to cure such horses, and so, although he killed your horse by his medicines, you shall have no action against him without an *assumpsit*." Newton, C. J. : "If I have a sore on my hand, and he applies a medicine to my heel, by which negligence my hand is maimed, still I shall not have an action unless he undertook to cure me." The court accordingly decided that a traverse of the *assumpsit* made a good issue.¹

It is believed that the view here suggested will explain the following passage in Blackstone, which has puzzled many of his readers : "If a smith's servant lames a horse while he is shoeing him, an action lies against the master, but not against the servant."² This is, of course, not law to-day, and probably was not law when written. Blackstone simply repeated the doctrine of the Year-Books.³ The servant had not expressly assumed to shoe carefully ; he was, therefore, no more liable than the surgeon, the barber, and the carpenter, who had not undertaken, in the cases already mentioned. This primitive notion of legal liability has, of course, entirely disappeared from the law. An *assumpsit* is no longer an essential allegation in these actions of tort, and there is, therefore, little or no semblance of analogy between these actions and actions of contract.

An express *assumpsit* was originally an essential part of the plaintiff's case in another class of actions, namely, actions on the case against bailees for negligence in the custody of the things intrusted to them. This form of the action on the case originated later than the actions for active misconduct, which have been already considered, but antedates, by some fifty years, the action of *assumpsit*. The normal remedy against a bailee was *detinue*. But there were strong reasons for the introduction of a concurrent remedy by an action on the case. The plaintiff in *detinue* might be defeated by the defendant's wager of law ; if he had paid in advance for the safe custody of his property, he could not recover in *detinue* his money, but only the value of the property ; *detinue* could not be brought in the King's Bench by original writ ; and the procedure generally was less satisfactory than that in case. It is

¹ See to the same effect Y. B. 48 Ed. III. 6, pl. 11 ; 11 R. II. Fitz. Ab. Act. on Case, 37 ; Rast. Ent. 463 b.

² 1 Bl. Com. 431.

³ Y. B. 11 Ed. IV. 6, pl. 10 ; 1 Roll. Ab. 94, pl. 1 ; 1 Roll. Ab. 95, pl. 1.

not surprising, therefore, that the courts permitted bailors to sue in case. The innovation would seem to have come in as early as 1449.¹ The plaintiff counted that he delivered to the defendant nine sacks of wool to keep; that the defendant, for six shillings paid him by the plaintiff, assumed to keep them safely, and that for default of keeping they were taken and carried away. It was objected that detinue, and not case, was the remedy. One of the judges was of that opinion, but in the end the defendant abandoned his objection; and Statham adds this note: . . . "*et credo* the reason of the action lying is because the defendant had six shillings which he [plaintiff] could not recover in detinue." The bailor's right to sue in case instead of detinue was recognized by implication in 1472,² and was expressly stated a few years later.³

The action against a bailee for negligent custody was looked upon, like the action against the surgeon or carpenter for active misconduct, as a tort, and not as a contract. The immediate cause of the injury in the case of the bailee was, it is true, a nonfeasance, and not, as in the case of the surgeon or carpenter, a misfeasance. And yet, if regard be had to the whole transaction, it is seen that there is more than a simple breach of promise by the bailee. He is truly an actor. He takes the goods of the bailor into his custody. This act of taking possession of the goods, his *assumpsit* to keep them safely, and their subsequent loss by his default, together made up the tort. The action against the bailee sounding in tort, consideration was no more an essential part of the count than it was in actions against a surgeon. Early in the reign of Henry VIII., Moore, Sergeant, said, without contradiction, that a bailee, with or without reward, was liable for careless loss of goods either in detinue or case;⁴ and it is common learning that a gratuitous bailee was charged for negligence in the celebrated case of *Coggs v. Bernard*. If there was, in truth, a consideration for the bailee's undertaking, the bailor might, of course, declare in contract, after special *assumpsit* was an established form of action. But, in fact, there are few instances of such declarations before the reign of Charles I. Even since that time, indeed, case has continued to be a frequent, if not the more frequent, mode of

¹ Statham Ab. Act. on Case (27 H. VI.).

² Y. B. 12 Ed. IV. 13, pl. 10.

³ Y. B. 2 H. VII. 11, pl. 9; Keilw. 77, pl. 25; Keilw. 160, pl. 2; Y. B. 27 H. VIII. 25, pl. 3.

⁴ Keilw. 160, pl. 2 (1510).

declaring against a bailee.¹ Oddly enough, the earliest attempts to charge bailees in *assumpsit* were made when the bailment was gratuitous. These attempts, just before and after 1600, were unsuccessful, because the plaintiffs could not make out any consideration.² The gratuitous bailment was, of course, not a benefit, but a burden to the defendant; and, on the other hand, it was not regarded as a detriment, but an advantage to the plaintiff. But in 1623 it was finally decided, not without a great straining, it must be conceded, of the doctrine of consideration, that a bailee might be charged in *assumpsit* on a gratuitous bailment.³

The analogy between the action against the bailee and that against the surgeon holds also in regard to the necessity of alleging an express *assumpsit* of the defendant. Bailees whose calling was of a *quasi* public nature were chargeable by the custom of the realm, without any express undertaking. Accordingly, so far as the reported cases and precedents disclose, an *assumpsit* was never laid in a count in case against a common carrier⁴ or innkeeper⁵ for the loss of goods. They correspond to the smith, who, from the nature of his trade, was bound to shoe skilfully. But, in order to charge other bailees, proof of an express *assumpsit* was originally indispensable. An *assumpsit* was accordingly laid as a matter of course in the early cases and precedents. Frowyk, C.J., says, in 1505, that the bailee shall be charged "*per cest parol super se assumpsit*."⁶ In *Fooley v. Preston*,⁷ Anderson, Chief Justice of the Common Bench, mentions, it is true, as a peculiarity of the Queen's Bench, that "it is usual and frequent in B. R. if I deliver to you an objection to rebail unto me, I shall have an action upon the case without an express promise." And yet, twelve years later, in

¹ In *Williams v. Lloyd*, W. Jones, 179; *Anon.*, Comb. 371; *Coggs v. Bernard*, 2 Ld. Ray. 909; *Shelton v. Osborne*, 1 Barnard. 260; 1 Selw. N. P. (13 ed.) 348, s. c.; *Brown v. Dixon*, 1 T. R. 274, the declarations were framed in tort.

² *Howlet v. Osborne*, Cro. El. 380; *Riches v. Briggs*, Cro. El. 883, Yelv. 4; *Game v. Harvie*, Yelv. 50; *Pickas v. Guile*, Yelv. 128. See, also, *Gellye v. Clark*, Noy, 126, Cro. Jac. 188, s. c.; and compare *Smith's case*, 3 Leon. 88.

³ *Wheatley v. Low*, Palm. 281, Cro. Jac. 668, s. c.

⁴ 1 Roll. Ab. 2, pl. 4; *Rich v. Kneeland*, Hob. 17; 1 Roll. Ab. 6, pl. 4; *Kenrig v. Eggleston*, Al. 93; *Nichols v. More*, 1 Sid. 36; *Morse v. Slue*, 1 Vent. 190, 238; *Levett v. Hobbs*, 2 Show. 127; *Chamberlain v. Cooke*, 2 Vent. 75; *Matthews v. Hoskins*, 1 Sid. 244; *Upshare v. Aidee*, Com. 25; *Herne's Pleader*, 76; *Brownl. Ent.* 11; 2 *Chitty, Pl.* (1 ed.) 271.

⁵ Y. B. 42 Lib. Ass. pl. 17; Y. B. 2 H. IV. 7, pl. 31; Y. B. 11 H. IV. 45, pl. 18; *Cross v. Andrews*, Cro. El. 622; *Gellye v. Clark*, Cro. Jac. 189; *Beedle v. Norris*, Cro. Jac. 224; *Herne's Pleader*, 170, 249. ⁶ *Keilw.* 77, pl. 25. ⁷ 1 Leon. 297.

Mosley *v.* Fosset¹ (1598), which was an action on the case for the loss of a gelding delivered to the defendant to be safely kept and redelivered on request, the four judges of the Queen's Bench, although equally divided on the question whether the action would lie without a request, which would have been necessary in an action of detinue, "all agreed that without such an *assumpsit* the action would not lie."² But with the lapse of time an express undertaking of the bailee ceased to be required, as we have already seen it was dispensed with in the case of a surgeon or carpenter. The acceptance of the goods from the bailor created a duty to take care of them in the same manner that a surgeon who took charge of a patient became bound, without more, in modern times, to treat him with reasonable skill.

Symons *v.* Darknoll³ (1629) was an action on the case against a lighterman, but not a common lighterman, for the loss of the plaintiff's goods. "And, although no promise, the court thought the plaintiff should recover." Hyde, C.J., adding: "Delivery makes the contract." The later precedents in case, accordingly, omit the *assumpsit*.⁴

¹ Moore, 543, pl. 720; 1 Roll. Ab. 4, pl. 5, s. c. The criticism in Holmes' "Common Law," 155, n. 1, of the report of this case seems to be without foundation.

² See also Evans *v.* Yeoman (1635), Clayt. p. 33: "Assumpsit. The case upon evidence was, that whereas the plaintiff did deliver a book or charter to the defendant, it was holden that unless there had been an express promise to redeliver this back again, this action will not lie."

The writer is tempted to suggest here an explanation of an anomaly in the law of waste. If, by the negligence of a tenant-at-will, a fire breaks out and destroys the house occupied by him as tenant, and another also belonging to his landlord, he must respond in damages to the landlord for the loss of the latter, but not of the former. Lothrop *v.* Thayer, 138 Mass. 466. This is an illustration of the rule that a tenant-at-will is not liable for negligent or permissive waste. Is it not probable that the tenant-at-will and a bailee were originally regarded in the same light? In other words, neither was bound to guard with care the property intrusted to him in the absence of a special undertaking to that effect. This primitive conception of liability disappeared in the case of chattels, but persisted in the case of land, as a rule affecting real property would naturally persist. In the Countess of Salop *v.* Crompton, Cro. El. 777, 784, 5 Rep. 13, s. c., a case against a tenant-at-will, Gawdy, J., admits the liability of a shepherd for the loss of sheep, "because he there took upon him the charge. But here he takes not any charge upon him, but to occupy and pay his rent." So also in Coggs *v.* Bernard, 2 Ld. Ray. 909. Powell, J., referring to the case of the Countess of Salop, says: "An action will not lie against a tenant-at-will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house he promised to deliver up the house to him again in as good repair as it was then, the action would have lain upon that special undertaking. But there the action was laid generally." ³ Palm. 523. See, also, Stanian *v.* Davies, 2 Ld. Ray. 795.

⁴ 2 Inst. Cler. 185; 2 Chitty, Pl. (7 ed.) 506, 507.

There is much in common between the two classes of actions on the case already discussed and still a third group of actions on the case, namely, actions of deceit against the vendor of a chattel upon a false warranty. This form of action, like the others, is ancient, being older, by more than a century, than special assumpsit. The words *super se assumpsit* were not used, it is true, in a count upon a warranty; but the notion of undertaking was equally well conveyed by "*warrantizando vendidit*."

Notwithstanding the undertaking, this action also was, in its origin, a pure action of tort. In what is, perhaps, the earliest reported case upon a warranty,¹ the defendant objects that the action is in the nature of covenant, and that the plaintiff shows no specialty but "*non allocatur*, for it is a writ of trespass." There was regularly no allusion to consideration in the count in case; if, by chance, alleged, it counted for nothing.² How remote the action was from an action of contract appears plainly from a remark of Choke, J.: "If one sells a thing to me, and another warrants it to be good and sufficient, upon that warranty made by parol, I shall not have an action of deceit; but if it was by deed, I shall have an action of covenant."³ That is to say, the parol contract of guaranty, so familiar in later times, was then unknown. The same judge, and Brian, C.J., agreed, although Littleton, J., inclined to the opposite view, that if a servant warranted goods which he sold for his master, that no action would lie on the warranty. The action sounding in tort, the plaintiff, in order to charge the defendant, must show, in addition to his undertaking, some act by him, that is, a sale; but the owner was the seller, and not the friend or servant, in the cases supposed. A contract, again, is, properly, a promise to act or forbear in the future. But the action under discussion must be, as Choke, J., said, in the same case, upon a warranty of a thing present, and not of a thing to come. A vendor who gives a false warranty may be charged to-day, of course, in contract; but the conception of such a warranty, as a contract, is quite modern. *Stuart v. Wilkins*,⁴ decided in 1778, is said to have been the first instance of an action of assumpsit upon a vendor's warranty.

We have seen that an express undertaking of the defendant was

¹ Fitz. Ab. Monst. de Faits, pl. 160 (1383).

² *Moor v. Russel*, Skin. 104; 2 Show. 284, s. c.

³ Y. B. 11 Ed. IV. 6, pl. 11.

⁴ 3 Doug. 18.

originally essential to the actions against surgeons or carpenters, and bailees. The parallel between these actions and the action on a warranty holds true on this point also. A case in the Book of Assises is commonly cited, it is true, to show that from very early times one who sold goods, knowing that he had no title to them, was liable in an action on the case for deceit.¹ This may have been the law.² But, this possible exception apart, a vendor was not answerable to the vendee for any defect of title or quality in the chattels sold, unless he had either given an express warranty, or was under a public duty, from the nature of his calling, to sell articles of a certain quality. A taverner or vintner was bound as such to sell wholesome food and drink.³ Their position was analogous to that of the smith, common carrier, and innkeeper.

The necessity of an express warranty of quality in all other cases is illustrated by the familiar case of *Chandelor v. Lopus*⁴ (1606-1607). The count alleged that the defendant sold to the defendant a stone, affirming it to be a bezoar stone, whereas it was not a bezoar stone. The judgment of the King's Bench, that the count was bad, was affirmed in the Exchequer Chamber, all the justices and barons (except Anderson, C.J.) holding "that the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezoar stone, it is not material; for every one in selling his wares will affirm that his wares are good, or that his horse is sound; yet, if he does not warrant them to be so, it is no cause of action." The same doctrine is repeated in *Bailie v. Merrill*.⁵ The case of *Chandelor v. Lopus* has recently found an able defender in the pages of this REVIEW. In the number for November, 1887, Mr. R. C. McMurtrie urges that the decision was a necessary consequence of the rule of pleading, that the pleader must state the legal effect of his evidence, and not the evidence itself. It is possible that the judgment would have been arrested in *Chandelor v. Lopus*, if it had come before an English court of the present century.⁶ But it is

¹ 3 Y. B. 42, Lib. Ass. pl. 8.

² But see *Kenrick v. Burges*, Moore, 126, per Gawdy, J., and *Roswell v. Vaughan*, Cro. Jac. 196, per Tanfield, C.B.

³ Y. B. 9 H. VI. 53, pl. 37; Keilw. 91, pl. 16; *Roswell v. Vaughan*, Cro. Jac. 196; *Burnby v. Bollett*, 16 M. & W. 644, 654.

⁴ Dy. 75 a, n. (23); Cro. Jac. 4.

⁵ 1 Roll. R. 275. See also *Leakins v. Clizard*, 1 Keb. 522, per Jones.

⁶ But see *Crosse v. Gardner*, 3 Mod. 261, Comb. 142, s. c.; *Medina v. Stoughton*, 1 Ld. Ray. 593, 1 Salk. 210, s. c.

certain that the judges in the time of James I. did not proceed upon this rule of pleading. To their minds the word "warrant," or, at least, a word equally importing an express undertaking, was as essential in a warranty as the words of promise were in the Roman *stipulatio*. The modern doctrine of implied warranty, as stated by Mr. Baron Parke in *Barr v. Gibson*,¹ "But the bargain and sale of a chattel, as being of a particular description, does imply a contract that the article sold is of that description," would have sounded as strangely in the ears of the early lawyers as their archaic doctrine sounds in ours. The warranty of title stood anciently upon the same footing as the warranty of quality.² But in Lord Holt's time an affirmation was equivalent to a warranty,³ and to-day a warranty of title is commonly implied from the mere fact of selling.³

However much the actions against a surgeon or carpenter for misfeasance, those against a bailee for negligent custody, and, above all, those against a vendor for a false warranty, may have contributed, indirectly, to the introduction of special assumpsit, there is yet a fourth class of cases which seem to have been more intimately connected with the development of the modern parol contract than any of those yet considered. These cases were, also, like the actions for a false warranty, actions on the case for deceit. That their significance may be fully appreciated, however, it will be well to give first a short account of the successive attempts to maintain an action for the simple breach of a naked parol promise, *i.e.*, for a pure nonfeasance.

The earliest of these attempts was in 1400, when an action was brought against a carpenter for a breach of his undertaking to build a house. The court was unanimous against the plaintiff, since he counted on a promise, and showed no specialty.⁵ In the same reign there was a similar case with the same result.⁶ The harmony of judicial opinion was somewhat interrupted fifteen years later in a case against a millwright on a breach of promise to build a mill within a certain time. Martin, J., like his prede-

¹ 3 M. & W. 390.

² Co. Lit., 102 a; *Springwell v. Allen* (1649) Al. 91, 2 East, 448, n. (a), s. c.

³ *Crosse v. Gardner*, 3 Mod. 261; 1 Show. 65, s. c.; *Medina v. Stoughton*, 1 Ld. Ray. 593, 1 Salk. 210, s. c.

⁴ *Eichholtz v. Bannister*, 17 C. B. N. s. 708; *Benj. Sale* (3 ed.), 620-631.

⁵ Y. B. 2 H. IV. 3, pl. 9.

⁶ Y. B. 11 H. IV. 33, pl. 60. See also 7 H. VI. 1, pl. 3.

cessors, was against the action; Cockayne, J., favored it. Babington, C.J., at first agreed with Cockayne, J., but was evidently shaken by the remark of Martin, J.: "Truly, if this action is maintained, one shall have trespass for breach of any covenant¹ in the world," for he then said: "Our talk is idle, for they have not demurred in judgment. Plead and say what you will, or demur, and then it can be debated and disputed at leisure." The case went off on another point.² Martin, J., appears finally to have won over the Chief Justice to his view, for, eight years later, we find Babington, C.J., Martin and Cotesmore, JJ., agreeing in a *dictum* that no action will lie for the breach of a parol promise to buy a manor. Paston, J., showed an inclination to allow the action.³ In 1435 he gave effect to this inclination, holding, with Juyn, J., that the defendant was liable in an action on the case for the breach of a parol promise to procure certain releases for the plaintiff.⁴ But this decision was ineffectual to change the law. Made without a precedent, it has had no following. The doctrine laid down in the time of Henry IV. has been repeatedly reaffirmed.⁵

The remaining actions on the case for deceit before mentioned may now be considered. In the first of these cases the writ is

¹ Covenant was often used in the old books in the sense of agreement, a fact sometimes overlooked, as in Hare, Contracts, 138, 139.

² Y. B. 3 H. VI. 36, pl. 33. One of the objections to the count was that it did not disclose how much the defendant was to have for his work. The remarks of the judges and counsel upon this objection seem to have been generally misapprehended. Holmes, Common Law, 267, 285; Hare, Contracts, 162. The point was this: Debt would lie only for a sum certain. If, then, the price had not been agreed upon for building the mill, the millwright, after completing the mill, would get nothing for his labor. It could not, therefore, be right to charge him in an action for refusing to throw away his time and money. Babington, C.J., and Cockayne, J., admitted the force of this argument, but the latter thought it must be intended that the parties had determined the price to be paid. There is no allusion in the case to a *quid pro quo*, or a consideration as a basis for the defendant's promise. Indeed, the case is valueless as an authority upon the doctrine of consideration.

³ Y. B. 11 H. VI. 18, pl. 10, 24, pl. 1, 55, pl. 26. ⁴ Y. B. 14 H. VI. 18, pl. 58.

⁵ Y. B. 20 H. VI. 25, pl. 11, per Newton, C.J.; Y. B. 20 H. VI. 34, pl. 4, per Ayscoghe, J.; Y. B. 37 H. VI. 9, pl. 18, per Moyle, J.; Y. B. 2 H. VII. 11, pl. 9, and Y. B. 2 H. VII. 12, pl. 15, per Townsend, J.; 18 H. VII. Keilw. 50, pl. 4, per curiam; Doct. & St. Dial. II. c. 24; Coggs v. Bernard, 2 Ld. Ray. 909, 919, per Lord Holt; Elsee v. Gatward, 5 T. R. 143. Newton, C.J., said on several occasions (Y. B. 19 H. VI. 24 b, pl. 47; Y. B. 20 H. VI. 34, pl. 4; Y. B. 22 H. VI. 43, pl. 28) that one who bargained to sell land for a certain sum to be paid might have debt for the money, and, therefore, on the principle of reciprocity, was liable in an action on the case to his debtor. But this view must be regarded as an idiosyncrasy of that judge, for his premise was plainly false. There was no *quid pro quo* to create a debt.

given, and the reader will notice the striking resemblance between its phraseology and the later count in *assumpsit*. The defendant was to answer for that he, for a certain sum to be paid to him by the plaintiff, undertook to buy a manor of one J. B. for the plaintiff; but that he, by collusion between himself and one M. N., contriving cunningly to defraud the plaintiff, disclosed the latter's evidence, and falsely and fraudulently became of counsel with M. N., and bought the manor for M. N., to the damage of the plaintiff. All the judges agreed that the count was good. Babington, C.J.: "If he discovers his counsel, and becomes of counsel for another, now that is a deceit, for which I shall have an action on my case." Cotesmore, J.: "I say, that matter lying wholly in covenant may by matter *ex post facto* be converted into deceit. . . . When he becomes of counsel for another, that is a deceit, and changes all that was before only covenant, for which deceit he shall have an action on his case."¹

The act of the defendant did not affect, it is true, the person or physical property of the plaintiff. Still, it was hardly an extension of the familiar principle of misfeasance to regard the betrayal of the plaintiff's secrets as a tortious invasion of his rights. But the judges encountered a real difficulty in applying that principle to a case that came before the Exchequer Chamber a few years later.² It was a bill of deceit in the King's Bench, the plaintiff counting that he bargained with the defendant to buy of him certain land for £100 in hand paid, but that the defendant had enfeoffed another of the land, and so deceived him. The promise not being binding of itself, how could the enfeoffment of a stranger be a tortious infringement of any right of the plaintiff? What was the distinction, it was urged, between this case and those of pure nonfeasance, in which confessedly there was no remedy? So far as the plaintiff was concerned, as Ayscoghe, J., said, "it was all one case whether the defendant made a feoffment to a stranger or kept the land in his own hands." He and Fortescue, J., accordingly thought the count bad. A majority of the judges, however, were in favor of the action. But the case was adjourned. Thirty-five years later (1476), the validity of the action in a similar case was impliedly recognized.³ In 1487 Townsend, J., and Brian, C.J., agreed that a traverse of the feoffment to the stranger was a good

¹ Y. B. 11 H. VI. 18, pl. 10, 24, pl. 1, 55, pl. 26. See also Y. B. 20 H. VI. 25, pl. 11.

² Y. B. 20 H. VI. 34, pl. 4.

³ Y. B. 16 Ed. IV. 9, pl. 7.

traverse, since "that was the effect of the action, for otherwise the action could not be maintained."¹ In the following year,² the language of Brian, C.J., is most explicit: "If there be an accord between you and me that you shall make me an estate of certain land, and you enfeoff another, shall I not have an action on my case? *Quasi diceret sic. Et Curia cum illo.* For when he undertook to make the feoffment, and conveyed to another, this is a great misfeasance."

In the Exchequer Chamber case, and in the case following, in 1476, the purchase-money was paid at the time of the bargain. Whether the same was true of the two cases in the time of Henry VII., the reports do not disclose. It is possible, but by no means clear, that a payment contemporaneous with the promise was not at that time deemed essential. Be that as it may, if money was in fact paid for a promise to convey land, the breach of the promise by a conveyance to a stranger was certainly, as already seen, an actionable deceit by the time of Henry VII. This being so, it must, in the nature of things, be only a question of time when the breach of such a promise, by making no conveyance at all, would also be a cause of action. The mischief to the plaintiff was identical in both cases. The distinction between misfeasance and nonfeasance, in the case of promises given for money, was altogether too shadowy to be maintained. It was formally abandoned in 1504, as appears from the following extract from the opinion of Frowyk, C.J.: "And so, if I sell you ten acres of land, parcel of my manor, and then make a feoffment of my manor, you shall have an action on the case against me, because I received your money, and in that case you have no other remedy against me. And so, if I sell you my land and covenant to enfeoff you and do not, you shall have a good action on the case, and this is adjudged. . . . And if I covenant with a carpenter to build a house and pay him £20 for the house to be built by a certain day, now I shall have a good action on my case because of payment of money, and still it sounds only in covenant and without payment of money in this case no remedy, and still if he builds it and misbuilds, action on the case lies. And also for nonfeasance, if money paid case lies."³

¹ Y. B. 2 H. VII. 12, pl. 15.

² Y. B. 3 H. VII. 14, pl. 20.

³ Keilw. 77, pl. 25, which seems to be the same case as Y. B. 20 H. VII. 8, pl. 18. 21 H. VII. 41, pl. 66, per Fineux, C.J., *accord.* See also Brooke's allusion to an "action on the case upon an *assumpsit pro tali summa.*" Br. Ab. Disceit, pl. 29.

The gist of the action being the deceit in breaking a promise on the faith of which the plaintiff had been induced to part with his money or other property, it was obviously immaterial whether the promisor or a third person got the benefit of what the plaintiff gave up. It was accordingly decided, in 1520, that one who sold goods to a third person on the faith of the defendant's promise that the price should be paid, might have an action on the case upon the promise.¹ This decision introduced the whole law of parol guaranty. Cases in which the plaintiff gave his time or labor were as much within the principle of the new action as those in which he parted with property. And this fact was speedily recognized. In Saint-Germain's book, published in 1531, the student of law thus defines the liability of a promisor: "If he to whom the promise is made have a charge by reason of the promise, . . . he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it."² From that day to this a detriment has always been deemed a valid consideration for a promise if incurred at the promisor's request.³

Jealousy of the growing jurisdiction of the chancellors was doubtless a potent influence in bringing the common-law judges to the point of allowing the action of assumpsit. Fairfax, J., in 1481, advised pleaders to pay more attention to actions on the case, and thereby diminish the resort to Chancery;⁴ and Fineux, C.J., remarked, after that advice had been followed and sanctioned by the courts, that it was no longer necessary to sue a *subpena* in such cases.⁵

That equity gave relief, before 1500, to a plaintiff who had incurred detriment on the faith of the defendant's promise, is reasonably clear, although there are but three reported cases. In one of

¹ Y. B. 12 H. VIII. 11, pl. 3.

² Doct. and Stud. Dial. II. c. 24.

³ Y. B. 27 H. VIII. 24, pl. 3; Webb's Case (1578), 4 Leon. 110; Richards v. Bartlett (1584), 1 Leon. 19; Baxter v. Read (1585), 3 Dyer, 272, b. note; Foster v. Scarlett (1588), Cro. El. 70; Sturlyn v. Albany (1588), Cro. El. 57; Greenleaf v. Barker (1590), Cro. El. 193; Knight v. Rushworth (1596), Cro. El. 469; Bane's Case (1611), 9 Rep. 93, b. These authorities disprove the remark of Mr. Justice Holmes (Common Law, 287) that "the law oscillated for a time in the direction of reward, as the true essence of consideration." In the cases cited in support of that remark the argument turned upon the point of benefit, as the only arguable point. The idea that the plaintiff in those cases had, in fact, incurred a detriment would have seemed preposterous. Professor Langdell's observations (Summary of Contract, § 64) are open to similar criticism.

⁴ Y. B. 21 Ed. IV. 23, pl. 6.

⁵ Y. B. 21 H. VII. 41, pl. 66.

them, in 1378, the defendant promised to convey certain land to the plaintiff, who, trusting in the promise, paid out money in travelling to London and consulting counsel; and upon the defendant's refusal to convey, prayed for a subpoena to compel the defendant to answer of his "disceit."¹ The bill sounds in tort rather than in contract, and inasmuch as even *cestuis que use* could not compel a conveyance by their feoffees to use at this time, its object was doubtless not specific performance, but reimbursement for the expenses incurred. *Appilgarth v. Sergeantson*² (1438) was also a bill for *restitutio in integrum*, savoring strongly of tort. It was brought against a defendant who had obtained the plaintiff's money by promising to marry her, and who had then married another in "*grete deceit*."³ The remaining case, thirty years later,⁴ does not differ materially from the other two. The defendant, having induced the plaintiff to become the procurator of his benefice, by a promise to save him harmless for the occupancy, secretly resigned his benefice, and the plaintiff, being afterwards vexed for the occupancy, obtained relief by subpoena.

Both in equity⁵ and at law, therefore, a remediable breach of a parol promise was originally conceived of as a deceit; that is, a tort. Assumpsit was in several instances distinguished from contract.⁶ By a natural transition, however, actions upon parol promises came to be regarded as actions *ex contractu*.⁷ Damages were soon assessed, not upon the theory of reimbursement for the loss of the thing given for the promise, but upon the principle of compensation for the failure to obtain the thing promised. Again, the liability for a tort ended with the life of the wrong-doer. But after the struggle of a century, it was finally decided that the per-

¹ 2 Cal. Ch. II.

² 1 Cal. Ch. XLI.

³ An action on the case was allowed under similar circumstances in 1505, *Anon.*, Cro. El. 79 (cited).

⁴ Y. B. 8 Ed. IV. 4, pl. 11.

⁵ The Chancellor (Stillington) says, it is true, that a subpoena will lie against a carpenter for breach of his promise to build. But neither this remark, nor the statement in Diversity of Courts, Chancery, justifies a belief that equity ever enforced gratuitous parol promises. But see Holmes, 1 L. Q. Rev. 172, 173; Salmond, 3 L. Q. Rev. 173. The practice of decreeing specific performance of any promises can hardly be much older than the middle of the sixteenth century. Bro. Ab. Act. on Case, pl. 72. But the invalidity of a *nudum pactum* was clearly stated by Saint-Germain in 1531. Doct. & St. Dial. II. Ch. 22, 23, and 24.

⁶ Y. B. 27 H. VIII. 24, 25, pl. 3; *Sidenham v. Worlington*, 2 Leon. 224; *Banks v. Thwaites*, 3 Leon. 73; *Shandois v. Simpson*, Cro. El. 880; *Sands v. Trevilian*, Cro. Car. 107.

⁷ *Williams v. Hide*, Palm. 548, 549; *Wirral v. Brand*, 1 Lev. 165.

sonal representatives of a deceased person were as fully liable for his assumpsits as for his covenants.¹ Assumpsit, however, long retained certain traces of its delictual origin. The plea of not guilty was good after verdict, "because there is a disceit alleged."² Chief Baron Gilbert explains the comprehensive scope of the general issue in assumpsit by the fact that "the gist of the action is the fraud and delusion that the defendant hath offered the plaintiff in not performing the promise he had made, and on relying on which the plaintiff is hurt."³ This allegation of deceit, in the familiar form: "Yet the said C. D., not regarding his said promise, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff," etc.,⁴ which persisted to the present century, is an unmistakable mark of the genealogy of the action. Finally, the consideration must move from the plaintiff to-day, because only he who had incurred detriment upon the faith of the defendant's promise, could maintain the action on the case for deceit in the time of Henry VII.

The view here advanced as to the origin of special assumpsit, although reached by an independent process, accords with, it will be seen, and confirms, it is hoped, the theory first proclaimed by Judge Hare.

The origin of *indebitatus assumpsit* may be explained in a few words: Slade's case,⁵ decided in 1603, is commonly thought to be the source of this action.⁶ But this is a misapprehension. *Indebitatus assumpsit* upon an express promise is at least sixty years older than Slade's case.⁷ The evidence of its existence throughout the last half of the sixteenth century is conclusive. There is a note by Brooke, who died in 1558, as follows: "Where one is indebted to me, and he promises to pay before Michaelmas, I may have an action of debt on the contract, or an action on the case on the promise."⁸ In *Manwood v. Burston*⁹ (1588), Manwood, C.B., speaks of "three manners of considerations upon which an assump-

¹ *Legate v. Pinchion*, 9 Rep. 86; *Sanders v. Esterby*, Cro. Jac. 417.

² *Corby v. Brown*, Cro. El. 470; *Elrington v. Doshant*, 1 Lev. 142.

³ *Common Pleas*, 53.

⁴ In *Impey's King's Bench* (5 ed.), 486, the pleader is directed to omit these words in declaring against a Peer: "For the Lords have adjudged it a very high contempt and misdemeanor, in any person, to charge them with any species of fraud or deceit."

⁵ 4 Rep. 92 a; *Yelv.* 21; *Moore*, 433, 667.

⁶ *Langdell, Cont.* § 48; *Pollock, Cont.* (4 ed.) 144; *Hare, Cont.* 136, 137; *Salmond*, 3 L. Q. Rev. 179.

⁷ *Br. Ab. Act. on Case*, pl. 105 (1542).

⁸ *Br. Ab. Act. on Case*, pl. 5.

⁹ 2 Leon. 203, 204.

sit may be grounded: (1) A debt precedent, (2) where he to whom such a promise is made is damnified by doing anything, or spends his labor at the instance of the promisor, although no benefit comes to the promisor . . . (3) or there is a present consideration."¹

The Queen's Bench went even further. In that court proof of a simple contract debt, without an express promise, would support an *indebitatus assumpsit*.² The other courts, for many years, resisted this doctrine. Judgments against a debtor in the Queen's Bench upon an implied assumpsit were several times reversed in the Exchequer Chamber.³ But the Queen's Bench refused to be bound by these reversals, and it is the final triumph of that court that is signalized by Slade's case, in which the jury found that "there was no other promise or assumption, but only the said bargain;" and yet all the judges of England resolved "that every contract executory implied an assumpsit."

Indebitatus assumpsit, unlike special assumpsit, did not create a new substantive right; it was primarily only a new form of procedure, whose introduction was facilitated by the same circumstances which had already made Case concurrent with Detinue. But as an express assumpsit was requisite to charge the bailee, so it was for a long time indispensable to charge a debtor. The basis or cause of the action was, of course, the same as the basis of debt, *i.e.*, *quid pro quo*, or benefit. This may explain the inveterate practice of defining consideration as either a detriment to the plaintiff or a benefit to the defendant.

Promises not being binding of themselves, but only because of the detriment or debt for which they were given, a need was naturally felt for a single word to express the additional and essential requisite of all parol contracts. No word was so apt for the purpose as the word "consideration." Soon after the reign of Henry VIII., if not earlier, it became the practice, in pleading, to lay all

¹ See further, Anon. (B. R. 1572), Dal. 84, pl. 35; Pulmant's case (C. B. 1585), 4 Leon. 2; Anon. (C. B. 1587), Godb. 98, pl. 12; Gill v. Harwood (C. B. 1587), 1 Leon. 61. It was even decided that assumpsit would lie upon a subsequent promise to pay a precedent debt due by covenant. Ashbrooke v. Snape (B. R. 1591), Cro. El. 240. But this decision was not followed.

² Edwards v. Burr (1573), Dal. 108; Anon. (1583), Godb. 13; Estrigge v. Owles (1589), 3 Leon. 200.

³ Hinson v. Burrridge, Moore, 701; Turges v. Beecher, Moore, 694; Paramour v. Payne, Moore, 703; Maylard v. Kester, Moore, 711.

assumpsits as made *in consideratione* of the detriment or debt.¹ And these words became the peculiar mark of the technical action of *assumpsit*, as distinguished from other actions on the case against surgeons or carpenters, bailees and warranting vendors, in which, as we have seen, it was still customary to allege an undertaking by the defendant.

It follows, from what has been written, that the theory that consideration is a "modification of *quid pro quo*," is not tenable. On the one hand, the consideration of *indebitatus assumpsit* was identical with *quid pro quo*, and not a modification of it. On the other hand, the consideration of detriment was developed in a field of the law remote from debt; and, in view of the sharp contrast that has always been drawn between special assumpsit and debt, it is impossible to believe that the basis of the one action was evolved from that of the other.²

Nor can that other theory be admitted by which consideration was borrowed from equity, as a modification of the Roman "*causa*." The word "consideration" was doubtless first used in equity; but without any technical significance before the sixteenth century.³ Consideration in its essence, however, whether in the form of detriment or debt, is a common-law growth. Uses arising upon a bargain or covenant were of too late introduction to have any influence upon the law of assumpsit. Two out of three judges questioned their validity in 1505, a year after assumpsit was definitively established.⁴ But we may go further. Not only was the consideration of the common-law action of assumpsit not borrowed from equity, but, on the contrary, the consideration, which gave validity to parol uses by bargain and agreement, was borrowed from the common law. The bargain and sale of a use, as well as the agreement to stand seised, were not executory contracts, but conveyances. No action at law could ever be brought against a bargainer

¹ In *Joscelin v. Sheldon* (1557), 3 Leon. 4, Moore, 13, Ben. & Dal. 57, pl. 53, s. c., a promise is described as made "in consideration of," etc. An examination of the original records might disclose an earlier use of these technical words in connection with an assumpsit. But it is a noteworthy fact, that in the reports of the half-dozen cases of the reign of Henry VIII. and Edward VI. the word "consideration" does not appear.

² See also Mr. Salmond's criticism of this theory, in 3 L. Q. Rev. 178.

³ 31 H. VI. Fitz. Ab. Subp. pl. 23; *Fowler v. Iwardby*, 1 Cal. Ch. LXVIII.; *Pole v. Richard*, 1 Cal. Ch. LXXXVIII.; Y. B. 20 H. VII. 10, pl. 20; Br. Feff. al use, pl. 40; Benl. & Dal. 16, pl. 20.

⁴ Y. B. 21 VIII. 18, pl. 30. The consideration of blood was not sufficient to create a use, until the decision, in 1565, of *Sharrington v. Strotton*, Plow. 295.

or covenantor.¹ The absolute owner of land was conceived of as having in himself two distinct things, the seisin and the use. As he might make livery of seisin and retain the use, so he was permitted, at last, to grant away the use and keep the seisin. The grant of the use was furthermore assimilated to the grant of a chattel or money. A *quid pro quo*, or a deed, being essential to the transfer of a chattel or the grant of a debt,² it was required also in the grant of a use. Equity might conceivably have enforced uses wherever the grant was by deed. But the chancellors declined to carry the innovation so far as this. They enforced only those gratuitous covenants which tended to "the establishment of the house" of the covenantor; in other words, covenants made in consideration of blood or marriage.³

J. B. Ames.

CAMBRIDGE.

[To be continued.]

THE PRINCIPLE OF LUMLEY v. GYE, AND ITS APPLICATION.

THE facts in the case of *Lumley v. Gye*⁴ may be stated in a few words. The plaintiff, the lessee of a theatre, had made a contract with Johanna Wagner to perform in his theatre for a certain time, with a condition in the contract that she should not sing nor use her talents elsewhere during the term, without the plaintiff's consent in writing. The defendant, whilst the agreement with Wagner was in force, and with full knowledge of its existence, and maliciously intending to injure the plaintiff, persuaded her to break her contract and refuse to perform in the plaintiff's theatre, and to depart from the employment. Mr. Justice Coleridge, in his dissenting opinion in the case, which has

¹ *Plow.* 298, 308; *Buckley v. Simonds*, *Winch*, 35-37, 59, 61; *Hore v. Dix*, 1 *Sid.* 25, 27; *Pybus v. Mitford*, 2 *Lev.* 75, 77.

² That a debt was, as suggested by Professor Langdell (*Contracts*, § 100), regarded as a grant, finds strong confirmation in the fact that Debt was the exclusive remedy upon a covenant to pay money down to a late period. *Chawner v. Bowes*, *Godb.* 217. See, also, 1 *Roll. Ab.* 518, pl. 2 and 3; *Brown v. Hancock*, *Hetl.* 110, 111, *per Barkley*.

³ *Bacon, St. of Uses* (Rowe's ed.), 13-14.

⁴ 2 *El. & Bl.* 216.

been so much admired, says: "In order to maintain this action one of two propositions must be maintained; either that an action will lie against one by whose persuasions one party to a contract is induced to break it to the damage of the other party, or that the action for seducing a servant from the master, or persuading one who has contracted for service from entering into the employ, is of so wide application as to embrace the case of one in the position and profession of Johanna Wagner." The opinion of the majority of the court, sustaining the action, was based principally, it seems, upon the second proposition above stated, viz., that the action on the case for enticing a servant applied to any case of a contract for personal service, regardless of the nature of the services. The principle stated in the first proposition was also affirmed and sanctioned, with the qualification, not stated by Coleridge, J., that the persuasion used by the defendant, to cause the breach of contract, must be malicious.

In *Bowen v. Hall*, 6 Q. B. D. 333, which was an action for persuading a skilled workman, who, with a few others, possessed a secret process for manufacturing glazed bricks, to break his contract with the plaintiff for exclusive service for five years, the question was presented, for the first time, in a court of error, whether the decision in *Lumley v. Gye* should be affirmed or reversed; and the Court of Appeal—one judge dissenting—affirmed the decision, but distinctly rejected the proposition that the action could be maintained as an action for enticing a servant. Upon that point the court declared that the reasoning of Coleridge, J., to the effect that the action for enticing servants from their employment was given by the Statute of Labourers, and applied only in case of menial servants, was as nearly as possible, if not quite, conclusive. The Court of Appeal rested its decision upon a broad principle, deduced from the historical case of *Ashby v. White*,¹ which was asserted to have been the foundation of the decision of the majority of the judges in *Lumley v. Gye*, in one branch of their arguments, and which is stated by Lord Justice Brett in these words: "That whenever a man does an act which, in law and in fact, is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which, in the particular case, does produce such an injury, an action on the case will lie." In other words, the case of *Lumley v. Gye*, as

¹ *Ld. Raym.* 938; *s. c.* 1 *Sm. L. C.* (8th ed.) 472.

it must now be read and understood, is an ordinary action on the case for a tort, in which the plaintiff must show damage resulting to him, more or less directly, from a wrongful act of the defendant.

In *Lumley v. Gye* the report states that special damage was alleged, but the case does not show what the special damage was. Neither in that case nor in *Bowen v. Hall* does it appear that there was any damage beyond the breach of the contract; and, in *Bowen v. Hall*, at least, the opinion of the court does not require the plaintiff to prove any damage which could not be assessed in an action for breach of the contract itself. The mere breach of the contract by the obligor supplies to the obligee the element of damage which is necessary to support an action of tort.¹ Such damage is, to be sure, the direct act of the party who breaks the contract, but the defendant is chargeable therefor, upon the ground that he has done an act which was likely to result in a breach of contract, and consequent damage to the plaintiff; and he is liable for the probable consequences of his act, even though the wrongful act of another must intervene to cause the damage.²

But what is the wrongful act of which the plaintiff complains? An act cannot be said to be wrongful unless it is in violation of some right in the plaintiff, or of some duty owed by the defendant to the plaintiff. A person who enters into a contract with another, acquires as against that other a right to performance of the contract according to its terms, or to damages for non-performance. Those are the only rights created by the contract; and, from the point of view of contract, those are the only rights which the obligee acquires. But the court, in *Lumley v. Gye*, announced the principle that the mere existence of the contract imposed upon all third persons who knew of its existence, a duty to forbear from

¹ One effect of the decision in *Lumley v. Gye* is to give the plaintiff two causes of action, one in tort and the other in contract, for what may be substantially the same damage. As the causes of action are distinct and consistent, the plaintiff is not obliged to elect, and a recovery upon one cannot be a bar to an action upon the other; but the plaintiff is not entitled to double compensation; and, it would seem, in the absence of direct authority, that an actual recovery of damages in one action ought to be admissible in evidence to reduce damages in the other. See, however, *Bird v. Randall*, 1 W. Bl. 373, 387; *Thompson v. Howard*, 31 Mich. 309.

² In this aspect the case of *Lumley v. Gye* is opposed to *Vicarș v. Wilcocks*, 8 East, 1, which held that the wrongful act of a third person in discharging the plaintiff from his employ, in consequence of words uttered by the defendant, did not constitute such special damage as would make the words actionable; but that case has been questioned (see *Lynch v. Knight*, 9 H. L. Cas. 577), and the decision in *Lumley v. Gye* is more in harmony with the general rule of damages, both in contract and tort.

doing any act maliciously, for the purpose of procuring a breach of the contract. In other words, it gave to the obligee a right to such limited forbearance as against all the world.¹

The right or duty thus declared is imposed by law, and, like all other rights and duties so created, is based upon reasons of expediency or sound policy, as understood by the court; and since it rests upon this foundation, and has been declared by a competent authority, the only practical question is how far the limitation extends.

Neither in *Lumley v. Gye* nor in *Bowen v. Hall* is it stated in general terms that it is a wrongful act to procure a breach of contract; but it is expressly declared that the defendants' act is not wrongful, and therefore not a violation of any right, unless it is malicious. Thus, in the opinion of Lord-Justice Brett, "Merely to persuade a person to break his contract may not be wrongful in law or fact, as in the second case put by Coleridge, J.² But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore an actionable act, if injury ensues from it. We think it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as *Lumley v. Gye*, and which is complained of in the present case, is therefore, because malicious, wrongful."³

It is perfectly clear that the word "malicious" is not used by the court in its ordinary meaning, and that the persuasion used by the defendant need not be for the purpose of gratifying feelings of hatred or ill-will toward the plaintiff; but it is also clear that a bad motive, a purpose in acting which the law condemns as unjustifi-

¹ Another method of stating the foundation of the rule in *Lumley v. Gye* is that the obligation created by a contract is a *res* which is the subject of ownership, and the obligee is protected as owner. See 1 *Harvard Law Review*, pp. 9-10, by Professor Ames. Also Piggott, *Law of Torts*, pp. 363, 368. Conceding this position, it may still be said that the duties imposed upon the world at large in favor of the owner of property are really founded on expediency and policy, and limited by the same considerations. Thus trespasses to property, and even the destruction of property, are often justifiable against the will of the owner. See Ames's *Cases on Torts*, ch. vii. §§ 3, 4; Addison on *Torts* (6th ed.), ch. ii. § 1.

² The case put was this: B agrees with A to go as supercargo for A to Sierra Leone, "and C, urgently, and *bona fide* advises B to abandon his contract, which, on consideration, B does, whereby loss results to A. I think no one will be found bold enough to maintain that an action would lie against C." 2 *El. & Bl.* at p. 247, per Coleridge, J., dissenting.

³ 6 *Q. B. D.* at p. 338.

able, is necessary, in order to make out the wrongful act. The same idea is expressed in a Massachusetts case, brought upon a cause of action similar to that in *Lumley v. Gye*. The declaration set forth intentional and wilful acts, done with the unlawful purpose to cause damage to the plaintiff, without right or justifiable cause on the part of the defendant; "which," says Mr. Justice Wells, "constitutes malice." *Walker v. Cronin*, 107 Mass. 555, 562.

It is in this aspect that the case of *Lumley v. Gye* is most interesting. It is a conspicuous example of an action on the case for a tort, in which malice is declared to be an essential element.

In *Lumley v. Gye* the judges apparently limited the principle to the case of contracts for exclusive personal service. In *Bowen v. Hall* the contract which the defendant had procured to be broken was a contract for such service; but the reasoning of the court was not confined to that class of cases, and was in no manner restricted, except by the statement that the question presented by the case was whether the decision in *Lumley v. Gye* should be affirmed or reversed. As the principle was stated and combated by Coleridge, J., and as it was elaborated by the Court of Appeal, in *Bowen v. Hall*, it embraced the whole field of contract. If it is a tort maliciously to procure the breach of a contract for exclusive personal service, why is it not a tort maliciously to procure the breach of any contract? All that the plaintiff is obliged to prove is a wrongful act, and damage. To procure the breach of a contract of sale is a damage in the same manner as to procure the breach of a contract of service. Why is it not equally a wrongful act? It may be said that, for reasons of policy, contracts for personal service should receive extraordinary protection, especially in the case of persons employed on account of their talents or peculiar skill, because the loss of the contract cannot be made good to the employer. But similar considerations can readily be suggested in the case of many other contracts, and they afford a very uncertain ground upon which to limit the application of the rule. If the case of *Lumley v. Gye* is to rest upon the principle stated in *Bowen v. Hall*, consistency requires that it should be extended to the breach of any contract. In one case, at least, it has been so applied.¹

¹ *Jones v. Stanley*, 76 N. C. 355. In cases where the defendant has caused the breach of a contract for exclusive personal service, the decision in *Lumley v. Gye* has been generally followed without question. *Bixby v. Dunlap*, 50 N. H. 256; *Jones v. Blocker*, 43 Georgia, 331; *Jones v. Mills*, 2 Devereux, 540; *Haskins v. Royster*, 70 N. C. 601; *Dickson v. Dickson*, 33 La. An., 1261.

It is immaterial also whether the breach of the contract is caused by persuasion or by any other means. If performance of a contract becomes impossible through an act of violence of the defendant, done for the express purpose of preventing performance, the element of damage which is necessary to support the action is present, and the damage—the non-performance of the contract—is the same as in the case of persuasion. If a man should be prevented from performing a contract through an assault and battery committed upon his person, with knowledge of the existence of the contract, and for the purpose of preventing its performance, every reason upon which the action in *Lumley v. Gye* was sustained would require that the defendant should be held. Or if a man should agree to sell a horse, and before the time for performance arrived, a third person, with knowledge of the contract of sale, kills the horse, for the same reasons he should be held.¹ Indeed, there is an additional reason for sustaining the action in these cases; for the person prevented from performing his contract would have a valid defence in an action for breach of the contract; and if the party injured by the breach of contract could not hold the trespasser he would have no remedy. In the case of *Taylor v. Neri*,² which is the only English case upon the point, Lord Chief Justice Eyre ruled at *nisi prius* that no action would lie for an assault and battery upon a performer, whereby the plaintiff lost his services; but that case was distinguished by the judges in *Lumley v. Gye*, upon the ground that the damages were too remote, and furthermore, no malice, or knowledge on the part of the defendant that the contract existed, was proved.

Neither does the principle require, in the case of contracts for personal service, that the service should be for a fixed term. If a man who is in the employ of another merely at will is induced by the persuasion of a third person to abandon the employment, it is a damage to the employer; for he is deprived of the advantages or profits which he would have obtained from the continuance of the service. And if the persuasion used by the third person was malicious, it is a wrongful act, and he is liable in an action of tort.

¹ It seems that by the Roman law in such a case an action was given to the person to whom the promise was made, but it was the action *de dolo*. "Si servum, quem tu mihi promiseras, alius occiderit, de dolo malo actionem in eum dandam plerique recte putant, quia tu a me liberatus sis: ideoque legis Aquiliae actio tibi denegabitur." D. 4, 3, 18, 5 (Paulus). Mommsen inserts *mihi* after *de dolo malo actionem*.

² 1 Esp. 386. See, also, *Burgess v. Carpenter*, 2 Richardson (S. C.), 7.

This is the case of *Walker v. Cronin*, above cited. It was an action on the case for enticing shoemakers to leave the employment of the plaintiff, and the court held, on a demurrer to the declaration, that a good cause of action was stated in each of the three counts, although the first two contained no allegation that the men were in the employ of the plaintiff or about to enter his employ, under a contract for a term, or under any fixed contract. Mr. Justice Wells stated the principle involved in these terms: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to." *Walker v. Cronin*, 107 Mass. 555, at 564.¹

This case is no doubt a more extreme case than *Lumley v. Gye*, but it is fairly within the principle. The only difficulty is to establish the element of damage, for no contract has been broken, and in departing from the service of the plaintiff the shoemakers did nothing but what they had a perfect right to do. But the court held that "the loss of advantages, either of property or of personal benefit, which, but for such interference, the plaintiff would have been able to attain or enjoy," constituted damage.

From the principle of damage here stated it is plain that logically at least the principle of *Lumley v. Gye* is applicable outside of the domain of contracts; and in point of authority the same principle, or something very similar, has often been applied in the law. Thus in the case of *Keeble v. Hickeringill*,² in the time of Lord Holt, an action was sustained for preventing wild-fowl from alighting near the defendant's decoy pond, by firing off guns in the neighborhood to frighten them away. In *Tarleton v. Magawley*³

¹ See *Evans v. Walton*, L. R. 2 C. P. 615; *Noice v. Brown*, 39 N. J. (Law) 569; *Peters v. Lord*, 18 Conn. 337.

² 11 East, 573, note; S. C. 11 Mod. 74, 130; 3 Salk. 9; Holt, 14, 17, 19. The same point was decided on similar facts in *Carrington v. Taylor*, 11 East, 571.

³ Peake, 205.

Lord Kenyon held that an action on the case would lie for discharging cannon-balls at negroes on the coast of Africa, whereby they were frightened and prevented from coming to the plaintiff's vessel to trade. In New York it has been held actionable in two instances¹ to cause the breach of a contract of sale, which was within the Statute of Frauds, and as to which the statute had not been satisfied, although both parties intended to perform. The means used by the defendant in each case were false representations, — in one case that the plaintiff did not want the goods which were the subject of the contract, and in the other that he did not intend to supply them, whereby the defendant procured the advantage of a contract with himself. In New Jersey, in the case of *Hughes v. McDonough*,² an action on the case was sustained, in which the defendant loosened a horseshoe put on by the plaintiff, for the purpose of causing the owner of the horse to believe that the plaintiff, who was a blacksmith, was an unskilful workman, whereby he lost the owner's trade. So a trader, in an action in his own right for defamatory words spoken of his wife, who assisted him in his business, was successful upon showing a falling off of custom at his store. *Riding v. Smith*, Ex. D. 91.

The above cases differ from *Lumley v. Gye* in the fact that the damage sustained was not the breach of a contract, nor indeed the loss of any property, but merely the failure to make a profit or gain; but that is sufficient to constitute damage.³ As to the other important element in the action on the case, viz., the wrongful act, the *injuria*, in each of the above instances, whether it consisted of violence, as in *Tarleton v. Magawley*, or of fraud, as in *Rice v. Manley*, it was wrongful as against the plaintiff, only because it was done without justifiable cause, for the purpose of causing the damage, or with knowledge that the damage would result. But such an act, as the word is used in *Lumley v. Gye*, and as it is used in the law of libel, is malicious, and wrongful only because it is malicious, or done without justifiable cause. It

¹ *Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 82. See *Green v. Button*, 2 C., M. & R. 707.

² 43 N. J. (Law) 459. See, also, *Rogers v. Rajendro Dutt*, 13 Moore P. C. 209, at 240.

³ This principle existed in the Roman law. The failure to make a profit (*lucrum cessans*), as well as a positive loss or injury to property (*damnum emergens*), was taken into account in assessing damages for a tort under the *lex Aquilia*. "*Inde Neratius scribit, si servus institutus occisus sit, etiam hereditatis aestimationem venire.*" D. 9, 2, 23, pr. (Ulpian). See Grueber, *Lex Aquilia*, 62, 268.

follows that the case of Lumley v. Gye is only one example of a class of cases in the law of torts, not included under any specific name, where damage is made actionable because it is malicious.

The act to be malicious must be done without a justifiable cause. In all of the cases thus far cited the act done by the defendant, where it was a lawful act, was done in the exercise of some common right, like the right to enter into a contract or to carry on a business or trade; and, in such cases, it may safely be stated that if such an act is done with a malicious purpose, or, what is the same thing, in violation of superior rights acquired by others, with knowledge of the existence of such rights, the act becomes wrongful and subjects the defendant to damages. So far actual decision has gone, though not without conflict.¹ But where the act is done by the defendant in the exercise of some right vested in him, individually, as by contract or grant, or as owner of property, a malicious purpose will not render the act unlawful, provided the method of exercising the right is lawful. In that class of cases the principle of Lumley v. Gye has no application, for the weight of authority is strongly in favor of the proposition that malice is immaterial.² As a question of principle, much might be said in favor of making all malicious acts unlawful, where malice is clearly proved; but the question being one that depends entirely upon reasons of expediency and policy, a course of decision, in different jurisdictions, tending strongly in one direction, is very convincing evidence of the weight of reason in the case.³

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¹ Heywood v. Tillson, 75 Maine, 225; Payne v. Western R.R. Co., 13 Lea, 507.

² See Cooley on Torts, 81, 581, where authorities are collected. There are dicta to the contrary, and the case of Chesley v. King, 74 Maine, 164, was directly *contra*; but that case seems to be of no authority since the decision in Heywood v. Tillson, *supra*.

³ In the Roman law, in the case of adjoining owners, it seems that a malicious use of property was actionable. "Denique Marcellus scribit, cum eo qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem; et sane non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit." D. 39, 3, 1, 12 (Ulpian). A similar principle is recognized in the Scotch law. See Pollock on Torts, 136, 137.

THE RIGHT TO FOLLOW TRUST PROPERTY WHEN CONFUSED WITH OTHER PROPERTY.

IT is a commonplace of text-books and cases on trusts that if the trustee converts money or property belonging to the trust and mingles it with other property, the trust is gone. The general theory on this point is well expressed by Lewis, J., in Thompson's appeal:¹ "Whenever a trust fund has been converted into another species of property, if its identity can be traced, it will be held in its new form liable to the right of the *cestui que trust*. So long as it can be identified either as the original property of the *cestui que trust*, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a *bona fide* purchaser for a valuable consideration without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fail. This is always the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description." If, however, it can be shown that the trust fund has gone to increase another fund, or has been used in the purchase of property, though what has been bought with trust money and what has not are entirely confused, has the *cestui que trust* only the rights of an ordinary creditor, or, if he has greater rights, what are they? It is this question which it is proposed to treat.

Throughout the discussion the word "trustee" is used broadly to indicate any one holding money or property in a fiduciary capacity, and the property is termed the trust fund, and the beneficial owner the *cestui que trust*. As the principles determining the rights of the parties are the same in every fiduciary relation, whether strictly that of trustee and *cestui que trust*, principal and agent, executor or administrator, and heirs or legatees, the terminology adopted is convenient and not misleading.

The question most frequently arises when the trustee, after having used the trust property, becomes insolvent and the *cestui que*

¹ 22 Pa. St. 16.

trust endeavors to make good a claim to priority against the general creditors. If the trust fund were traceable to a separate piece of property the right to that property would be clear,¹ and it is inequitable if the chance circumstance that the trustee has mingled the trust money with his own should deprive the *cestui que trust* of all rights against the property which his money has purchased, and such a distinction could only be defended on the ground that when the trust fund is confused with other money it is beyond the power of the court to give the relief which it gives when the money is not mingled. This does not seem to be the case, though formerly the Court of Chancery may have so considered it. If the trust fund is traceable as having furnished in part the money with which a certain investment was made, and the proportion it formed of the whole money so invested is known or ascertainable, the *cestui que trust* should be allowed to regard the acts of the trustee as done for his benefit, in the same way that he would be allowed to if all the money so invested had been his; that is, he should be entitled in equity to an undivided share of the property which the trust money contributed to purchase, — such a proportion of the whole as the trust money bore to the whole money invested.

The reason in one case as in the other is that the trustee cannot be allowed to make a profit from the use of trust money, and if the property which he wrongfully purchased were held subject only to a lien for the amount invested, any appreciation in value would go to the trustee.

It will often happen, however, that the *cestui que trust* cannot identify any property as being purchased wholly or in a fixed proportion with his money, and therefore equity cannot regard him as the owner of any property either individually or in common, and yet that he can show that the trust fund has gone to swell the general assets of the trustee's estate, for instance, if used in a general business which soon afterwards becomes insolvent. In such a case there can be no trust, strictly speaking. It is as necessary for equitable as for legal ownership that there should be fixed property as the subject-matter of it. In both cases the necessity rests rather on the nature of things than on any rule of law. It would, however, be in the highest degree unjust that the rights of the *cestui que trust* should be made to depend on whether his property

¹ 1 Perry on Trusts, § 127.

is distinguishable from the general mass of the trustee's property, or indistinguishable. Though indistinguishably confused, still his money or his money's worth is there, and if the machinery of the court can work it out he should be enabled to get at it. Equity accomplishes justice in this case by giving the *cestui que trust* a lien on the property of the trustee, analogous to the vendor's lien, — a right to be paid from the estate in priority to the general creditors.

This latter right the *cestui que trust* always has, even though he may also be able to follow his money into a certain investment.¹ In case the investment has turned out badly, it would be for his advantage not to regard the investment as having been made for him, not to treat it as his property, but to assume that it has been wrongfully converted, and take a lien on what was purchased with his money and come in with the general creditors for the deficit occasioned by the depreciation of the investment.²

The different classes of cases involving these points will now be examined somewhat more particularly.

If a trustee purchase real estate partly with his own money and partly with trust money, it is universally allowed that the *cestui que trust* has a claim in equity against the land, but the exact nature of the right allowed is not entirely uniform. If the property purchased should increase in value, it is for his interest to obtain an undivided share of it, rather than a lien on the property for the bare amount of the trust money put in. If the proportion which the trust money bore to the purchase money is known or ascertainable, the larger right should, it seems, be allowed, as the trustee's estate otherwise benefits by the misappropriation. The question has not, however, been very fully discussed and the decisions are not uniform. In England the point can hardly be considered entirely settled, but in *Knatchbull v. Hallett*,³ Sir George Jessel, M. R., after speaking of the *cestui que trust's* right "to elect either to take the property purchased, or to hold it as a security for the amount of the trust money laid out in the purchase," makes the dictum: "But in the second case, where a trustee has mixed the money with his own there is this distinction, that the *cestui que trust*, or beneficial owner, can no longer elect to

¹ 1 Perry on Trusts, § 128.

² *Riehl v. Evansville Foundry Assoc.*, 104 Ind. 70.

³ 13 Ch. D. 696, 709.

take the property, because it is no longer bought with the trust money purely and simply, but with a mixed fund. He is, however, still entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase."

In Massachusetts it is held that where the consideration for the purchase of land is paid in part only by one person and the title is taken in the name of another, no resulting trust will be created unless "the part of the purchase money paid by him in whose favor the resulting trust is sought to be enforced be shown to have been paid for some specific part or distinct interest in the estate, for 'some aliquot part' as it is sometimes expressed; that is, for a specific share, as a tenancy in common or joint tenancy of one-half, one-quarter, or other particular fraction of the whole; or for a particular interest, as a life estate, or tenancy for years, or remainder in the whole; and a general contribution of a sum of money towards the entire purchase is not sufficient."¹ As this is the case where the transaction is rightful, it was supposed to follow that when the consideration was wrongfully paid in part with the *cestui que trust's* money he could not claim a specific portion of the land, for the misappropriated money must have been used as a general contribution only to the purchase money, and consequently he would not be entitled to a specific share under the rule above given. The point was so decided in *Bresnihan v. Sheehan*.²

The considerations, however, determining the rights of the *cestui que trust* when his money has been wrongfully used as part of the consideration, are different from those determining the rights of one who has paid part of the consideration, the conveyance being taken in the name of another. In the latter case there is a resulting trust, which depends on the presumed intention of the parties.³ When A pays the purchase money and B takes the title, equity compels B to hold the title in trust for A, because it is presumed that was the intention; and similarly when A pays only a part, the court will regard B as holding an aliquot part proportioned to the amount paid, in trust for A, if it is presumed that such was the intention. The Massachusetts court in effect decided that if A's intention was not expressed, that the money which he furnished should pay for an

¹ *M'Gowan v. M'Gowan*, 14 Gray, 119.

² 125 Mass. 11.

³ 1 *Perry on Trusts*, § 125. If the evidence shows no trust was intended, none will result although the purchase money was not paid by the grantee. *Livermore v. Aldrich*, 5 Cush. 431; *Bibb v. Smith*, 12 Heisk. 728; *Carter v. Montgomery*, 2 Tenn. Ch. 216; *Darrier v. Darrier*, 58 Mo. 222; *Seibold v. Christman*, 75 Mo. 308.

aliquot part, the court could not presume it. And similar decisions have been reached elsewhere.¹ Other courts have reached an opposite conclusion.² The real difference is on the question whether it is a fair inference from the simple fact that A paid \$3,000 and B paid \$2,000, B taking the title, that the intention of the parties is that A shall have three-fifths interest in the land and B two-fifths, or, on the other hand, that the intention is that the land shall be B's, A's only interest in it being to secure a debt to him. Consider now the case where misappropriated trust money forms a part of a purchase by the trustee. The rights which the *cestui que trust* has of following the property rest, not on any presumed intention, but on the principle devised for the protection of beneficiaries of trusts that the trustee cannot be allowed to make a profit for himself by dealing with the trust estate. To avoid this the *cestui que trust* should be allowed to regard the investment of his money in the way most favorable to him, throwing the risks on the wrong-doer. So that if the property decreases in value the *cestui que trust* would take only a lien on the property, but if it increases in value, he should be allowed to treat the transaction as if for his benefit, that is, he should be allowed to claim a proportional part of the property. This, though often called a resulting trust, is properly a constructive trust, being purely the consequence of rules of equity, irrespective of intention.

In *Day v. Roth*³ also the court gave the plaintiff, whose money had been used in the purchase of the property in question, an equitable lien, but there is nothing in the case to show that any greater right was asked.

According to the latest decisions in Pennsylvania, the *cestui que trust* may recover a specific share, and he is confined to that relief, for the court repudiates the whole doctrine of equitable lien. In a recent case⁴ misappropriated trust money belonging to the plaintiff was used in improving land, and the plaintiff was endeavoring to secure a right against the land. Gordon, J., in delivering the opinion of the court, made use of the following language: "It is said the money of these beneficiaries has been used to improve this property, and that they ought, therefore, to have a lien

¹ Ames' Cas. Trusts, 289; *Shaffer v. Fetty*, 4 S. E. Rep. 278 (W. Va.).

² *Springer v. Springer*, 114 Ill. 550; *Bowen v. McKean*, 82 Mo. 594; *Shaw v. Shaw*, 86 Mo. 594; *Parker v. Coop*, 60 Tex. 111.

³ 18 N. Y. 448.

⁴ Appeal of Cross and Gault, 97 Pa. St. 471.

upon it to the extent of the moneys so expended, but what kind of a lien? Not a statutory one. . . . A lien arising from the equitable circumstances of the case? But such a lien is unknown in Pennsylvania jurisprudence. It has not been as yet engrafted upon our legal system, and it is to be hoped never will be." Sharswood, C.J., dissented. An earlier case,¹ where trust money was deposited in a bank with other money, had held that the beneficiaries did not lose their rights; but dicta to the contrary occur in the People's Bank Appeal,² and also in Hopkins' Appeal.³ Though an equitable lien is thus disallowed, the very recent case of M'Laughlin v. Fulton⁴ allowed a woman, whose money had been invested by her son with his own, to recover specifically $\frac{2}{3}$ of the land, that being the ratio her money bore to the whole purchase price.

The general rule in this country allows the *cestui que trust* to recover a specific share of the property purchased. In White v. Drew,⁵ the trustee bought land for \$1,590; \$950 of this was paid with money in his hands as administrator. The land was sold under order of the court for over \$6,000, and the plaintiff received $\frac{950}{1590}$ of this. In Tilford v. Torrey,⁶ the court, although finally deciding that there was not sufficient evidence to hold the defendant, in discussing the question, said, "If part only of the purchase money be paid with trust funds, a resulting trust will be created to the extent of the payment, or the *cestui que trust* may charge the land with the repayment to him of the sum so paid." Similarly, in Greene v. Haskell,⁷ where the agent of the plaintiff, contrary to his instructions, invested funds of his principal together with his own in the purchase of ivory, the court decreed that the ivory should be sold by a master, and that the plaintiff was entitled to take the amount misappropriated, with interest, or his proportionate amount, from the proceeds. In other jurisdictions also the decisions or remarks of the court favor this view.⁸

A question, similar to that which has been considered, arises where trust money is paid into a bank to the private account of

¹ Farmers' and Mechanics' National Bank v. King, 57 Pa. St. 202. See also Rupp's Appeal, 100 Pa. St. 531.

² 93 Pa. St. 107.

³ 9 Atl. Rep. 867.

⁴ 104 Pa. St. 161.

⁵ 42 Mo. 561.

⁶ 53 Ala. 120.

⁷ 5 R. I. 447.

⁸ Roberts v. Haley, 65 Cal. 397; Bazemore v. Davis, 55 Ga. 504; Fausler v. Jones, 7 Ind. 277; Derry v. Derry, 98 Ind. 319; Morrison v. Kinstra, 55 Miss. 71; Lyon v. Atkin, 78 N. C. 258; Watson v. Thompson, 12 R. I. 466.

the trustee, funds of his own being paid to the same account. Here the question is not whether the *cestui que trust* is entitled to a lien or to a proportionate part, for it is entirely immaterial in the case of money, but whether he has any rights at all against the bank account. There can be little doubt that, according to the older English precedents, the question would have to be answered in the negative. Money when mixed with other money could not be followed, because it had no ear-mark. A consideration of these old cases led Justice Fry, so late as 1879, to decide that the rights of the *cestui que trust* were gone.¹ It had been decided, however, in *Pennell v. Deffell*,² that the *cestui que trust* was entitled in equity to his money though mingled with other money, and did not become an ordinary creditor. This case was followed by *Frith v. Cartland*,³ and other cases.⁴ But, as stated before, Mr. Justice Fry, finding it impossible to reconcile the early decisions with the late ones, took the extraordinary course of following the early cases and disregarding the later ones, though admitting their doctrine to be preferable. The law on the subject was thus in a very unsettled state till Sir George Jessel, M.R., in a case involving the state of facts now under consideration,⁵ made a thorough review of the whole subject. He frankly admitted that formerly equity would give no relief, but was of opinion that the modern doctrine in equity was at variance, that equity had advanced. He accordingly overruled Mr. Justice Fry's decision, and again placed the matter in a satisfactory shape. Any other result would involve the consequence that a trustee by simply putting one dollar of his own with a sum of trust money would make himself merely a debtor instead of a trustee, although the trust fund were still in existence and in his possession. The doubt arose because the judges were not (to quote Jessel's words), "Aware of the rule of equity, which gave you a charge—that if you lent £1,000 of your own and £1,000 trust money on a bond for £2,000 or on a mortgage for £2,000, or on a promissory note for £2,000, equity could follow it, and create a charge." The case has been followed very recently.⁶

In this country what Sir G. Jessel calls the modern doctrine of

¹ *Ex parte Dale*, 11 Ch. D. 672.

² 4 De G., M. & J. 372.

³ 2 H. & M. 417.

⁴ *Brown v. Adams*, L. R. 4 Ch. App. 764; *Ex parte Cooke*, 4 Ch. D. 123; *Birt v. Burt*, 36 L. T. Rep. 943.

⁵ *Knatchbull v. Hallett*, 13 Ch. D. 696.

⁶ *Gilbert v. Gonard*, 54 L. J. Ch. 439.

equity has generally found favor with the courts.¹ But in two States, at least, there are decisions to the contrary.² They rest on the simple fact that the subject-matter of the trust is confused with other property. For instance, in *Steamboat Co. v. Locke*³ the court say: "The bill states in substance that S at the time of his death had on deposit upon his individual account \$898.08, and that 'said deposit included and covered' a balance of \$559.35 held by said S in trust, and the prayer of the bill is, that the defendant as administrator upon S's estate may be required to pay over said balance. It is plain from these statements that the trust funds were not only deposited to the private and individual account of S, but that the funds had become in some way mixed with other funds belonging to him, for the balance claimed to be due from him to the company is considerably less than the amount remaining on deposit in the bank. The identity of the trust fund is therefore lost, and in such a case the *cestui que trust* can stand no better than other creditors." Such reasoning as this shows that the court had in mind the possibility of a strict trust only, and not a charge on the whole fund to the amount of the trust.

In most of the cases which come up on this point there is a complicating circumstance not hitherto mentioned. That is, the trustee, after mingling his own money and the trust money in his private account, draws on the account to a greater or less extent. Can the *cestui que trust* still claim to be reimbursed in full from the amount left on deposit, or should it rather be held that a portion of the fund withdrawn was his money? It is a general rule of presumption, when it becomes important to decide to which of several deposits drafts on the account should be charged, that the deposits shall be deemed to have been drawn out in the same order in which they were put in, so that each draft when paid would be charged against the earliest deposit in the account.⁴ This rule was applied in *Pennell v. Deffell*,⁵ the court deciding that it made no difference that some of the deposits were of trust money.

¹ Third Nat. Bank v. Stillwater Gas Co., 21 Am. Law Rev. 192 (Minn.); Rabel v. Griffin, 12 Daly, 241; Van Alen v. American Nat. Bank, 52 N. Y. 1; Farmers' and Mechanics' Nat. Bank v. King, 57 Pa. St. 202 (see *supra*); Overseers v. Bank of Va., 2 Gratt. 544; Nat. Bank v. Ins. Co., 104 U. S. 54.

² Neely v. Rood, 54 Mich. 134; Goodell v. Buck, 67 Me. 514; Steamboat Co. v. Locke, 73 Me. 370; *Ex parte* Hobbs, 14 N. B. R. 495.

³ 73 Me. 370.

⁴ Clayton's Case, 1 Mer. 608.

⁵ 4 De G., M. & J. 372.

Subsequent English cases followed this decision.¹ In *Knatchbull v. Hallett*,² however, the court (Thesiger, L. J., dissenting, as he felt bound by authority), after having disposed of the view that the *cestui que trust* had no claim at all, decided that the presumption did not apply where the balance was composed in part of trust funds and in part of the trustee's private funds, but that in such a case it should be presumed that the trustee drew out what he had a right to use, that is, his own money. It certainly should not be presumed unnecessarily that the trustee is a wrong-doer. It frequently happens that a trustee deposits trust money to his private account, not from any bad intent, but merely from ignorance of the duties of his position, and he carefully keeps a balance at least as great as the amount of the trust. The presumption of the court should be that fair dealing was intended, so far as the facts proved will allow such a presumption. The American cases which allow the *cestui que trust* any right against such a mingled deposit are in accordance with the later English rule.

Let it be supposed, however, that the balance at some time falls below the amount of the trust money. In such a case the conclusion cannot be avoided that as to the difference between the two the trust money has been withdrawn, so that as to this difference the *cestui que trust* must follow it into what is purchased with it, or if unable to do that, must take the position of an ordinary creditor. Nor will subsequent deposits of the trustee's own money give any larger right in the absence of special circumstances indicating an intention on the part of the trustee to fill the deficit in the amount of the trust money, for such an intention cannot be presumed. Unless such an intention be shown, therefore, the equitable charge on the account can never exceed the smallest balance to the trustee's credit, since the deposit of the trust money. Thus, if the balance were reduced to nothing, even for a day, the *cestui que trust* would have no specific claim.

In all the cases hitherto considered, the trust money has been traced into some specific investment or deposit, although confused with other property. The case remains to be considered where this cannot be done, but a whole estate can be shown to be increased by the amount of a trust fund. A case illustrating this well is *People v. The Bank of Rochester*.³ The defendant bank

¹ *Merriman v. Ward*, 1 J. & H. 377; *Frith v. Cartland*, 2 H. & M. 417; *Brown v. Adams*, L. R. 4 Ch. 764; *Ex parte Cooke*, 4 Ch. D. 123.

² 13 Ch. D. 696.

³ 96 N. Y. 32.

had discounted notes for H, and the latter, wishing to anticipate payment, gave the bank checks for the amount of the notes less rebate of interest. These checks the bank received and charged to H's account as depositor, and made entries in its books that the notes were paid. As a matter of fact, the bank had previously sold the notes. About a month after this, and before the notes became due, the bank failed. It was held that an order requiring the receiver to pay the notes out of the funds in his hands was properly granted; that the transaction between the bank and H was not in their relation of debtor and creditor, but that by it a trust was created, the violation of which constituted a fraud by which the bank could not profit and to the benefit of which the receiver was not entitled.

In two cases in Kansas,¹ the facts were very similar and the decisions the same as in *People v. Bank of Rochester*,² and the same principle is involved in other decisions.³ The decided weight of authority is shown by these cases. In the case of *Illinois Trust & Savings Bank v. The First National Bank of Buffalo*⁴ the Circuit Court for the northern district of New York reached an opposite result, holding that though the defendant had collected a draft as agent for the plaintiff, and had kept instead of remitting the proceeds, and in a few days had suspended payment, the plaintiff had no priority over other creditors. But three years later the Supreme Court of New York decided⁵ on almost precisely the same facts that the party sending the draft for collection was entitled to such priority, the court saying, "If the identical money collected by the bank did not pass into the hands of the receiver it makes no difference, for, in some shape or form, they went to swell the assets which fell into his hands."⁶

There were several decisions⁷ under the late national bankruptcy

¹ *Peak v. Ellicott*, 30 Kan. 156; *Ellicott v. Barnes*, 31 Kan. 170.

² 96 N. Y. 32.

³ *Harrison v. Smith*, 83 Mo. 210 (overruling *Mills v. Post*, 76 Mo. 426); *Stoller v. Coates*, 88 Mo. 514; *Thompson v. Gloucester Bank*, 8 Atl. Rep. 97 (N. J.); *People v. Bank of Dansville*, 39 Hun, 187; *McColl v. Fraser*, 40 Hun, 111; *McLeod v. Evans*, 66 Wis. 401.

⁴ 15 Fed. Rep. 858; and see, to the same effect, *Bank of Commerce v. Russell*, 2 Dill. 215.

⁵ *People v. Bank of Dansville*, 39 Hun, 187.

⁶ A decision to the same effect has recently been rendered in New Jersey, *Thompson v. Gloucester Bank*, 8 Atl. Rep. 97.

⁷ *White v. Jones*, 6 N. B. R. 175; *In re Hosie*, 7 N. B. R. 601; *In re C. & T. B. Manufg Co.*, 12 N. B. R. 203.

law, denying the *cestui que trust* any priority. In none of them is there any discussion of the question, and the decisions are based on the wording of the Bankrupt Act very largely. "A proper construction of this clause [exempting trust property from assignment on the trustee's bankruptcy] of the Bankrupt Act will only apply it to property still held *in specie* and which can be distinguished from other property of the bankrupt, or where the proceeds constitute a separate and distinct fund, — not to cases where they have become mingled with the general assets of the bankrupt, even by his wrongful act."¹

It is frequently of the utmost importance how far the burden is placed on the *cestui que trust* to make out that his property actually forms a part of the whole estate on which he is endeavoring to obtain a lien, that is, how much he must prove to make out a *prima facie* case. If he had to show not only that his property had been mingled with the trustee's, but also that in the payments made from the combined property the money in fact used was not derived from the trust, he could seldom make out his case. It has been held, therefore, that the wrongful commingling of the property being shown, it is incumbent on the trustee to show what property is his,² and it follows that in the case supposed the *cestui que trust* need not show that payments made indiscriminately from the mixed funds were not made with his money, but the trustee must show that they were if he wishes to disprove the claim of the *cestui que trust* to an equitable charge; and the assignee in bankruptcy or creditors of the trustee can have no greater right than the trustee himself.

A distinction, however, should be observed which has not always been noticed by the courts.³ It is not enough that the trust money should have been used to the benefit of the private estate. Unless the court is of opinion that the trust fund forms part of the estate under consideration, the *cestui que trust* can have no other standing than that of an ordinary creditor. If, for instance, the trustee pays his private debts with the money of the *cestui que trust*, it cannot give a lien on the trustee's estate. To allow this would be injustice to the simple creditors, as may easily be seen by taking a concrete example. A is trustee of \$10,000 for B.

¹ *In re C. & T. B. Manuf'g Co.*, 12 N. B. R. 203.

² 1 Perry on Trusts, § 128.

³ *McColl v. Fraser*, 40 Hun, 111; *McLeod v. Evans*, 66 Wis. 401.

He has \$20,000 of property of his own, and is indebted \$30,000. He takes the trust money, and with it reduces his indebtedness to \$20,000. Now if B is allowed a lien on A's private property there will be but \$10,000 left for the other creditors, from which they will get fifty cents on the dollar, whereas, if A had not touched the trust money, there would have been \$20,000 to pay \$30,000 debts, or sixty-six cents on the dollar.

It was suggested in a dissenting opinion in *McLeod v. Evans*,¹ that the *cestui que trust* should receive priority to the extent which the estate had benefited by the misappropriation, irrespective of whether any part of the trust money was in any form in the estate; but it is believed that this is mistaking the true reason for allowing priority, which is brought out in a very recent case in New York.² The court say: "The courts below seem to have proceeded upon a supposed equity springing from the circumstance that, by the application of the fund to the payment of White's creditors, the assigned estate was relieved *pro tanto* from debts which otherwise would have been charged upon it, and that thereby the remaining creditors, if entitled to distribution, without regard to the petitioner's claim, will be benefited. We think this is quite too vague an equity for judicial cognizance, and we find no case justifying relief under such circumstances."

"If it appears that trust property has been wrongfully converted by the trustee and constitutes, although in a changed form, a part of the assets, it would seem to be equitable and in accordance with equitable principles that the things into which the trust property has been changed should, if required, be set apart for the trust, or, if separation is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property entering into and constituting a part of the assets." This rule simply asserts the right of the true owner to his own property."

Samuel Williston.

HARVARD LAW SCHOOL.

¹ 66 Wis. 401.

² *Matter of Cavin v. Gleason*, 105 N. Y. 256.

HARVARD LAW REVIEW

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WITH the present number the HARVARD LAW REVIEW begins its second volume. During the coming year we purpose to continue the same general policy. The leading articles will be contributed by the professors in the School and the others already indicated in the list of contributors. We hope, besides, to make a special feature of short articles, written by younger members of the profession and by students in the School, which shall deal, if possible, with subjects of current interest. The summary of work in the Law School will be the same as before. We wish to say a word about the "Recent Cases." The field is too wide for us to attempt a complete digest, however brief, of the multitude of cases decided every month. It is our aim to present only the cases, comparatively few in number, which show the progress and general tendencies of the law. All such cases will be given, and comments and references added, wherever practicable, in the hope that by making this department suggestive rather than exhaustive, we may render it of more value.

In conclusion, we realize that the REVIEW is yet only an experiment, but, prompted by the kind encouragement we have already received, we shall do our best to keep the standard as high as possible. We trust that in a few years, with the continuance of this encouragement, it will have an established place, and contribute its share in spreading the influence and work of the Harvard Law School.

THE recent Ohio Common Pleas case of *State v. Yates*¹ is not authority for the proposition that a dog may be the subject of larceny at common law, as it has been currently reported. The defendants were indicted for burglary, in breaking and entering a stable with intent to steal two dogs, and stealing two dogs of the value of \$40. The defendants demurred to the indictment. The court overruled the demurrer on the ground that as the Ohio Larceny Act declares "anything of value may be stolen," a dog, being a "thing of value," may, under the

¹ Reported in *The Albany Law Journal*, vol. 37, p. 233.

statute, be stolen. Breaking and entering with intent to steal a dog is, therefore, burglary in Ohio.

The case is interesting reading, on account of the various authorities cited, including poetical citations from Byron, Pope, and Burns, and prose from Motley and the Bible.

MR. SEYMOUR D. THOMPSON contributes an interesting article to the "Central Law Journal" on the use of documents to refresh the memory of witnesses.¹ The notion contained in this practice is, that it is sufficient if the witness is "able to swear that the memorandum is correct, although he may have forgotten the facts." Therefore it is not material by whom the memorandum is made, or even that it is a copy. Mr. Thompson does not extend this principle so far as to regard the time when it was made as immaterial; on the contrary, he argues that because the memorandum must have been made at or about the time of the events to which it relates, therefore a witness should not be allowed to refer to his own previous testimony or depositions.

It seems formerly to have been thought that the witness could not use memoranda, unless he had some independent recollections which merely needed a little revivifying; but that idea has been broadened to the rule quoted above. A witness may now refer to a memorandum of events of which he has no positive recollection, provided he will swear that it is an accurate record. In that case, Mr. Thompson thinks, the document itself may be given to the jury, though he admits a difficulty in finding any settled rule on the point.

The article contains many references to authorities.

In the January "Law Quarterly Review" Mr. Herbert Stephen discusses the recent New Zealand case of *Reg. v. Hall*,² which is chiefly valuable in the specific limitation that it sets upon the doctrine of *Reg. v. Geering*³ and other later cases, that, where it is a question whether a given act was accidental or intentional, evidence is admissible that such act was one of a series of circumstances in each of which the defendant was similarly concerned.

In *Reg. v. Hall* the defendant was indicted for the murder by poisoning of one Cain, his wife's step-father. On the trial evidence was offered that the defendant had subsequently attempted to poison his wife, in order to show that the administration of poison to Cain was not accidental. The court held that the evidence was not admissible, because there was not sufficient prior evidence that the defendant was the person who administered the poison to Cain, and because the evidence went less to show that the administration was intentional than it did to show that Hall was the person who administered it. The court held, says Mr. Stephen, that "evidence of this class could only be admitted on account of its relevancy to the question of accident or intention, when there was evidence *aliunde* fixing the prisoner with the administration."

In other words, the court limits the doctrine of *Reg. v. Geering* to cases where the fact that the prisoner committed the act in question

¹ Memoranda to Refresh Recollection of Witnesses. The Cent. L. Jour. vol. 26, no. 13, p. 311.

² Evidence in Criminal Cases of Similar but Unconnected Acts. The Law Quarterly Review, vol. iv. no. 13, p. 75.

³ 18 L. J. M. C. 215.

has first been proved by other evidence ; only then does the evidence of other similar acts become admissible to rebut the theory of accident.

THE decision of the United States Supreme Court in the "telephone cases," on March 19, involved a principle of patent law of far reaching importance. The court held not only that Bell was the first discoverer and inventor of the telephone, but that his patent covered the entire principle of transmitting sound by means of the vibratory or undulatory electric current, and not merely the special apparatus by which he accomplished that result. The reasoning of the court is as follows : —

Bell found out that by gradually changing the intensity of a continuous electric current, so as to make it correspond exactly with the change in the density of the air caused by sonorous vibrations, vocal and other sounds could be transmitted to a distance. This was his discovery. He then devised an apparatus for making these changes of intensity, so that speech could be actually transmitted. This was his invention. The law patented not only the invention but the discovery. The patent granted him is not limited to the mere appliance by which the discovery is made of actual value, but extends to the process or principle itself. His patent, therefore, extends to the entire art of transmitting sound by means of the changing density of a continuous electric current.

The justices who dissented from the opinion, on the ground that Drawbaugh was in fact the inventor of the telephone, did not dissent from this general principle.

WE have received from Mr. John F. Baker, of New York City, an interesting communication upon the subject of the authorship of the Statute of Frauds, from which we make the following extracts : —

"Lord Mansfield, in the important case of *Wyndham v. Chetwynd* (1 Burr. 418), assumed that the act was introduced into Parliament in the common way, and not upon any reference to the judges ; and there expresses the belief that Lord Hale could not have drawn the statute, as it was not passed by Parliament until after his death. . . .

"The Statute of Frauds must have been prepared as early as 1673, for at the first session of that year it was introduced in Parliament ; and after that it went before several committees, and was discussed at several sessions previous to its passage in the spring of 1677. Hence, the theory advanced by Lord Mansfield would hardly seem tenable or sound, nor is it certainly borne out by the facts of contemporaneous history.

"After a careful investigation of the question, I think the conclusion will not escape the mind of the student that Sir Matthew Hale was the master-spirit in formulating the statute, and that he prepared the bulk of that instrument ; that Sir Leoline Jenkins, an able authority in probate law, drew the sections as to wills ; that Lord Guilford took some part in preparing the statute ; and that Lord Nottingham not only drew the sections in relation to trusts and devises, but was conspicuously active in piloting the bill through Parliament."

THE following classified list of the members of the Harvard Law School Association, by States and Territories, on April 1, 1888, has been kindly sent us by Mr. Winthrop W. Wade, treasurer of the Association. He also writes the gratifying statement that "since January

1, 1888, the Association has increased its membership by 120 new members, 75 joining during the month of January, and 45 during the months of February and March."

STATES AND TERRITORIES REPRESENTED.

No. of Members.		No. of Members.		No. of Members.	
Alaska	1	Louisiana	1	Pennsylvania . . .	11
Alabama	1	Maine	13	Rhode Island . . .	8
Arkansas	1	Maryland	8	Tennessee	2
California	11	Massachusetts . . .	409	Texas	5
Colorado	9	Michigan	11	Vermont	2
Connecticut	6	Minnesota	11	Virginia	1
Dakota	2	Mississippi	1	Washington Terri-	
Delaware	4	Missouri	22	tory	1
District of Colum-		Montana	2	West Virginia . .	1
bia	15	Nebraska	1	Wisconsin	3
Georgia	2	New Hampshire . .	7		
Illinois	18	New Jersey	4	New Brunswick . .	10
Indiana	3	New York	89	Nova Scotia . . .	5
Iowa	2	North Carolina . .	1	France	1
Kansas	1	Ohio	47	United States of	
Kentucky	6	Oregon	1	Colombia	1
Total					761

STATES AND TERRITORIES UNREPRESENTED.

Arizona,	New Mexico,	Wyoming.
Florida,	South Carolina,	
Nevada,	Utah,	

THE LAW SCHOOL.

IN THE MOOT COURT.

Coram GRAY, J.

Bond v. Selwyn.

The acquisition by prescription of a right of way over land is not prevented by orders or threats on the part of the owner of the land against the use of the way, if such orders or threats are not complied with or yielded to.

TRESPASS QUARE CLAUSUM. The time of trespass alleged was January 11, 1887, with a *continuando*. The plaintiff and defendant owned adjoining parcels of land. The defendant in 1876 began to cross the plaintiff's land by a defined path from his own land to the highway, and continued, openly and constantly, to use the path till the date of the writ, October 20, 1887.

The plaintiff repeatedly told the defendant that he must not use the path; that the plaintiff forbade him to use it; that the defendant was a trespasser; and that he would sue the defendant for trespass in using the

path. But the plaintiff never prevented the defendant, or attempted to prevent him, by physical force, from using the path, nor did he ever obstruct it, nor, until this suit, had he brought any action against the defendant.

The Statute of Limitations to suits for the recovery of land is ten years.

On the facts above stated, which were not in dispute, the judge directed a verdict for the defendant, which was returned, and the plaintiff alleged exceptions.

W. H. Cowles and L. P. Frost, for the Plaintiff.

H. H. Johnson and H. N. Castle, for the Defendant.

GRAY, J. Statutes providing for the acquisition of easements by lapse of time are comparatively modern. The claim to an easement could always be supported by immemorial prescription, but when, by 3 Edw. I. c. 39, it was enacted that in a writ of right none should declare of the seisin of his ancestors prior to 1189, the courts, by analogy to that statute, held that the enjoyment of an easement from before that year would give a good title.

When the 32 Henry VIII. c. 2, shortened the time which would bar a writ of right to a period of sixty years before the *teste* of the writ, the courts did not shorten the time for acquiring an easement accordingly, but the year 1189 still remained the date from which such time was to be reckoned.

Later, indeed, it was held that the enjoyment of an easement for twenty years raised a presumption that it had existed from 1189. But this presumption was rebuttable, and could often be easily rebutted.

To take away, however, a right which had been enjoyed perhaps two hundred years because it could be shown that it had not existed five hundred years, was not to be endured. The judges escaped this result by instructing juries, that if a man had enjoyed an incorporeal hereditament for twenty years, they might presume that he had received a grant of it which had been lost. This was at first a mere presumption of fact, which juries might disregard if they pleased. It was gradually hardening in England into a presumption of law, when the Prescription Act of 2 and 3 Wm. IV. c. 71 (1832) was passed. In *Angus v. Dalton*, 3 Q. B. D. 85; 4 Q. B. D. 162; 6 Ap. Cas. 740, a question arose which had slipped through the meshes of this Act, and had to be decided without its aid. The great majority of the judges in that case were of opinion that the presumption of a lost grant raised by twenty years' enjoyment was a presumption of law. As might be expected when a legal conception has been passing through such a transition, the language of judges and writers concerning it is vacillating and confusing.

In this country the time held necessary to raise a presumption of a lost grant has generally followed every change in the Statutes of Limitations; the nature and effect of personal disabilities in determining questions of prescription have been borrowed from those Statutes; and several courts have of late rejected the doctrine of a lost grant, and declared that the presumption of such a grant is an unnecessary fiction; that though it might once have had its use as a scaffolding before the modern doctrine of prescription was established, it is now to be considered settled that the statute provisions as to the limitation of actions

for the recovery of land are to be extended, so far as applicable, to the acquirement of incorporeal rights by prescription; and that the doctrine of a lost grant is a stumbling-block, which is best out of the way. These cases have met with general acceptance, and represent, I think, the law of the United States to-day. *Wallace v. Fletcher*, 10 Post. 434; *Tracy v. Atherton*, 36 Vt. 503. Even if the theory of a lost grant is still to be perpetuated, the law in this country is now that the presumption of such grant is a legal presumption, and that no evidence can be introduced that in fact such grant was never made.

This conclusion disposes of some of the cases cited for the defendant, such as *Nichols v. Ayler*, 7 Leigh, 546, which go upon the ground that the presumption is one of fact; but it does not dispose of the whole case.

I have said that the law arising under the Statute of Limitations is to be extended, *so far as it is applicable*, to cases of the acquirement of easements; but the question remains, how far it is applicable; corporeal and incorporeal rights are not identical, and it may not be possible to apply the rules which govern the one class to the other.

The ordinary form of the Statute of Limitations is that no one shall bring an action to recover land or make an entry thereon more than twenty years after the right of action or entry accrues. Here, of course, threats and complaints by a disseisee will not stop the running of the Statute against him. The right to bring an action first accrued to him when he was disseised, and this fact is unaffected alike by his holding his tongue, or by his threats. Whether he is silent, or whether he complains and threatens, is immaterial, except so far as the complaints and threats tend to rebut any notion that the holding is by license.

But no action will lie by the owner of a servient tenement to recover an easement over his land, nor can he make any entry upon such easement. He is already seised of the land over which the easement is exercised, and therefore it does not seem conclusive against the proposition that threats will interrupt the acquisition of an easement, that they will not stop the running of the Statute of Limitations.

The real question seems, in applying the rules of the Statute of Limitations to cases of prescription, to be this: What acts amount to an interruption of the possession of an easement, corresponding to an interruption of the possession of a freehold? To stop the running of prescription, there must be a dispossession of the person exercising the easement from the right which he is exercising.

Some learned persons have denied that there can be any true possession of easements; but this seems to overlook the fact that the only things of which we have legal possession are rights. The things which we can hold in our hands are very few, and in extending the idea of possession beyond such things it must be referred to the power and intention to exercise rights, and it makes no difference whether they be single rights like rights of way, or the bundles of rights which constitute the rights in a corporeal hereditament.

For a man to have possession there must be (1) a desire on his part that persons generally may not do anything concerning a material object which is inconsistent either with his doing any act concerning that thing, or with his doing certain specified acts concerning that thing; (2) there must have been some outward act on or touching the thing

sufficient to indicate that desire (what such act shall be is often highly conventional); (3) there must be no act done by a third person which is inconsistent and intended to be inconsistent with the fulfilment of such desire.

Now, here the defendant's desire was that no one should do anything concerning a strip of land which was in any way inconsistent with his going how and when he pleased over it, and he had indicated this in the ordinary way by walking over the strip when and how he pleased.

Did the plaintiff do anything which was inconsistent with the defendant's going when and how he pleased over the strip? If he had placed a physical obstruction there, he would have done something inconsistent with the defendant's using the way as he pleased; so if he had frightened him off, for then his fears would not have allowed him to use it. But here that the threats were not inconsistent with his going how and when he pleased appears from the fact that he continued to go how and when he pleased.

I therefore think that there was no dispossession or interruption of the defendant's exercise of his easement. Another line of thought leads to the same conclusion. Nothing can be an interruption preventing the acquisition of a right of way unless it would be an actionable disturbance of a right of way already acquired. Suppose the defendant in this case had had a way by grant over the land of the plaintiff, and the plaintiff had done as he has done now, his conduct would not have amounted to a disturbance of the way for which an action would have lain.

For these reasons I am of opinion that the easement has been acquired, and that the verdict for the defendant was correct. This is in accord with *Lehigh Valley R.R. Co. v. McFarlan*, 43 N.J.L. 605, the case in which the matter has been most fully discussed, and which has been lately followed by *Jordan v. Lang*, 22 S. C. 159.

Exceptions overruled.

LECTURE NOTES.

LARCENY. — (*From Prof. Thayer's Lectures.*) — In Middleton's case¹ it was decided that one who receives money offered him by a mistake not caused by him, and knowing that the money is not his, is guilty of larceny. As to the reason for the decision, all that can be said is that, on one ground and another, the majority held this doctrine. Seven out of the fifteen judges before whom the case was argued, and of the eleven who composed the majority of the court, held that it was larceny because the title did not pass.

But this case does not support that doctrine. I have always been inclined to think the opinion of the minority the sound one, — that it was no crime.

In Ashwell's case² the verdict was directed by the court, that the case might be reserved, and was sustained simply because the court above were equally divided. There was no question of agency or of power to pass title. Though there was mistake, yet the owner intended to hand that coin to that particular person; and it is a reason-

¹ *Queen v. Middleton*, L. R. 2 C. C. R. 38.

² *Queen v. Ashwell*, 16 Q. B. D. 190.

able view which Mr. Holmes supports,¹ that the line should be drawn just here. The defendant was not, therefore, guilty of larceny. In *Flowers' case*² the question, as it was presented, was simply whether one is guilty of larceny who receives money without a felonious intention, and afterwards (no matter how soon) appropriates it; and the court say that, without question, he would not be.

BILLS AND NOTES ON WHICH ARE FICTITIOUS NAMES. RIGHTS OF INNOCENT HOLDERS FOR VALUE. — (*From Prof. Ames' Lectures.*)

1. If one draws a bill or makes a note in the belief that it is payable to a particular person, his intent is to pay to the order of that person. Hence if any one else indorses the instrument, the drawer or maker cannot be held, such indorsement not being within the contract.³ But if one accept a bill payable to A, under the impression that A₁ is meant, while the drawer really means A₂, the court would probably hold the acceptor on the indorsement of A₂, on the ground that the identity of the payee is a matter of indifference to the acceptor, who relies on only the drawer in accepting. On principle the acceptor of a bill payable to a fictitious name, which he believed to be the name of a real person, should be held under an indorsement by the drawer in that name. On the same reasoning one who draws a bill or makes a note for accommodation should be held, even if the payee is other than he supposed. He relies on the credit of the friend he is accommodating, and the identity of the payee is a matter of indifference to him.

2. If one draws or accepts a bill, or makes a note which he knows to be payable to a fictitious payee, he is bound by an indorsement which in form is the same as the name of the payee. But to hold the acceptor of a bill drawn in a fictitious name and payable to the drawer's order, it must be shown that the indorsement in the name of the payee was made by the drawer, or by his authority, for the acceptor's contract is to pay to the order of the drawer under this fictitious name.⁴

3. If one draws or accepts a bill or makes a note payable to some name of which he knows nothing, he is bound if the indorsement is by one having a right to use that name. If the name of the payee is fictitious, and is known to be such at the time of signing, the case comes under (2) above; if it is not known to be fictitious, or if no inquiry is made, or a blank form is signed, an acceptor is bound.⁵ This is on the theory that if the acceptance is given after the bill is drawn the acceptor contracts either (a) to pay to the order of any person, firm, etc., properly using that name, or (b) to pay to any one who holds the note as indorsee under an indorsement corresponding in form to the payee's name and made by the drawer; for the bill is really in the interest of the drawer, and not, as where there is a real payee, in the interest of the payee. Hence only the drawer properly has the right to indorse it. Thus the acceptor is liable whether the facts are as indicated in (a) or as in (b). If the acceptance is on a blank form the above reasoning applies, on the principle that an acceptance in blank binds the acceptor in the same way that he would be

¹ Holmes' Com. Law, 312, 313; cf. 135 Mass. 283.

² *Queen v. Flowers*, Q. B. D. 643.

³ *Bennett v. Farnell*, 1 Campb. 130; Ames' Cases on Bills and Notes, vol. 1, 461.

⁴ *Cooper v. Meyer*, 10 B. & C. 468; Ames' Cases on Bills and Notes, vol. 1, 493.

⁵ *Cooper v. Meyer*, *supra*.

bound if he had accepted the bill after it was drawn.¹ A drawer or maker would be bound in the same way and for the same reasons, but it is well to remark that a bill would seldom be drawn or a note made to a fictitious payee, except by way of accommodation.

4. A bill or note payable to an inanimate object is treated as payable to bearer, for otherwise it would be void, and as the essence of the contract is simply to pay money, the contract will be sustained if possible.²

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting all the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ADMINISTRATORS—INDIRECT SALE BY ADMINISTRATOR TO HIMSELF.—A, an administrator with the will annexed, was ordered by the probate court to sell certain land at auction. At the sale, B, a banker, was purchaser for a certain sum, part of which was to be paid down in money, and the remainder in notes secured by a mortgage. No money was actually paid down, because A trusted B to credit him with the requisite sum on his bank account. The court then confirmed the sale, and A forthwith executed a deed to B, leaving it with counsel to be delivered on B's giving the notes and mortgage. This B did. He then conveyed the land to A upon A's oral agreement to discharge him from his liability as purchaser. There was nothing to show that he purchased originally because of any understanding with A. *Held*, that the whole transaction was void, since it came within the general proposition that a trustee cannot become a purchaser at his own sale. The case is an illustration of how far a court will go in the application of this principle. *Caldwell v. Caldwell*, 15 N. E. Rep. 297 (Ohio).

AGENCY—KNOWLEDGE OF AGENT IMPUTED TO PRINCIPAL.—A broker employed by plaintiff to reinsure a vessel, having heard that the ship was lost, notified plaintiff that insurance could only be effected at a high figure, which plaintiff declined to pay. The plaintiff then insured through other brokers. The reported loss was not communicated to him, and the policy was renewed in entire good faith. *Held*, that the knowledge of the broker could not be imputed to the plaintiff. *Blackburn, Low, & Co. v. Vigors*, 57 L. T. 730.

This case has excited wide comment. The House of Lords affirmed the original decision of Mr. Justice Day, and reversed the decision of Lords Justices Lindley and Lopes in the Court of Appeal; and, it would seem, correctly. The Lords apparently distinguish this case from two other cases of agency: (1) captains or ship agents who have charge of the ship insured; (2) agents through whom the insurance is effected. "The one class is especially employed for the purpose of communicating to [the principal] the very facts which the law requires him to divulge to the insurer; the other is employed, not to procure or give information concerning the ship, but to effect an insurance." For somewhat doubtful reasons the knowledge of the first class is imputed to the principal; that the knowledge of the second should be imputed is clear. But, in this case, there was no legal duty resting on the broker to disclose what he knew, nor did he procure the insurance. His knowledge, therefore, is merely that of a stranger.

ATTORNEY—DISBARMENT—OFFERING MONEY FOR TESTIMONY.—Respondent, an attorney, believing a certain paper to be a forgery, employed an expert to examine it. The expert expressed his doubt as to the forgery; but the respondent, supposing that the expert believed it to be a forgery and only expressed his doubt to extort money for his testimony, offered him a large sum of money to testify that it was a forgery. *Held*, no sufficient ground for disbarment; "such conduct may be

¹ *London & S. W. Bank v. Wentworth*, 5 Ex. D. 96.

² *Mechanics' Bank v. Stratton et al.*, 3 Keyes, 365; *Ames' Cases on Bills and Notes*, vol. 1, p. 574.

open to criticism, but attorneys should not permit the interests of their clients to suffer by reason of any refined ideas of propriety." *In re Barnes*, 16 Pac. Rep. 896 (Cal.).

BANKS AND BANKING—INSOLVENCY—DRAFTS FOR COLLECTION.—Plaintiff sent to F. bank a draft indorsed "for collection," accompanied with instructions to "collect and credit proceeds." F. bank sent the draft to defendant, and the latter collected it, received the proceeds and credited them to the F. bank. Defendant notified F. bank of the collection, but the latter suspended business before crediting plaintiff with the proceeds. *Held*, that defendant's title depended upon that of the F. bank, and that as the relation of principal and agent, which existed between the F. bank and plaintiff, could only be changed to that of debtor and creditor by a credit of proceeds on books of bank while it was solvent, and as such credit took place after suspension of bank, plaintiff was entitled to recover full amount of draft. *First Nat. Bank of Circleville v. Bank of Monroe*, 33 Fed. Rep. 409 (New York); *In re Armstrong*, id. 405 (Ohio). See also *Giles v. Perkins*, 9 East, 13.

BILL OF EXCHANGE—ORAL ACCEPTANCE.—The drawee of an order on presentment and demand, after taking time to consider, told the payee, "I think there will be money enough to pay you, and it will be all right, and I will pay it." On another occasion, the payee's agent asked the drawee about the order, and said he "would not pay it that afternoon; but tell Short [the payee] it is all right, and I will pay it;" and the agent so informed the payee. *Held*, that these words, though not in writing, in absence of a statute requiring written acceptances, constituted a valid acceptance. *Short v. Blount*, 5 S. E. Rep. 190 (N. C.). For comment and collection of authorities on oral acceptances see Ames' Cas. on Bills and Notes, Vol. II., p. 168, note 2.

CHARITABLE CORPORATIONS—CIVIL LIABILITY.—The plaintiff purchased a grave of the defendant, a cemetery association. His wife died, and when the funeral procession reached the grave, it was found that the defendant had carelessly permitted the burial of two other bodies in the plaintiff's grave. Trespass was brought, and plaintiff recovered damages. The defence was, that the defendant was a charitable association, and as such not subject to civil liability. It was shown that no member received any profit, but that all the funds were used in ornamenting the grounds, burying the poor, giving graves to public institutions, and the like. But the court said that the association was not legally a charitable one, because there was nothing in the charter which compelled the application of any part of its funds to charitable uses. That the funds were, in fact, so applied, ought to be no more a defence, than if defendant were a private individual. *Donnelly v. Boston Catholic Cem. Ass'n*, 15 N. E. Rep. 505 (Mass.).

CHECK UPON FUND—EQUITABLE ASSIGNMENT.—A check drawn on a general deposit before bankruptcy does not operate as an equitable assignment *pro tanto*. *Florence Min. Co. v. Brown*, 8 Sup. Ct. Rep. 531, 534.

CONTRACT—CONSIDERATION—FORBEARANCE TO SUE.—Defendants agreed to pay the plaintiff \$400, in consideration of his forbearing to contest a will which was, in fact, perfectly valid. *Held*, that where a person gives up what he in good faith believes to be a right of action, on the promise of another to pay money for such surrender, the real consideration of the contract consists in the detriment suffered by the person consenting to the surrender, arising from the alteration in his position caused by the promise of the other. *Rue v. Miers et al.*, 12 Atl. Rep. 369 (N. J.).

Callisher v. Bischoffsheim, L. R. 5 Q. B. 449, is followed as authority. See also *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266; *Eckford v. Barelli*, 20 W. R. 116; *Grandin v. Grandin*, 9 Atl. Rep. 756. To the effect that forbearance to sue is not a good consideration for a promise, unless there is a reasonable doubt as to the validity of the claim, see Langdell, Summary of Contracts (2d ed.), §§ 56, 57, and cases there cited.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER.—A local option law forbidding the sale of intoxicating liquors, providing that any county, or any town or city having a population of over 2,500 inhabitants, may by a majority vote come under the operation of the law, is not a delegation of legislative power, but is a law to take effect upon the happening of a future contingency, namely, the vote of the people of the respective localities. Sherwood, J., dissenting. The case contains a full collection and discussion of authorities. *State v. Pond*, 6 S. W. Rep. 469 (Mo.).

CONSTRUCTIVE TRUST — LAND OBTAINED BY FRAUD — RESTITUTION. — B sold to M a certain tract of land which was misdescribed in the deed. M, intending to convey the land he had purchased of B, executed a deed to G, who, knowing of the error in original description, had prepared the deed containing a description of a portion of the premises actually conveyed by B to M. G sold to a *bona fide* purchaser. B in the meantime had sold the land described in the deed from B to M to one Mullen, from whom plaintiff traces title. *Held*, that G was a constructive trustee of the property while the title was in his name; that having disposed of the land he was chargeable to plaintiff with its value at the time of the conveyance to the *bona fide* purchaser; and that the amount due from such purchaser should be applied in satisfaction of the same. *Cogswell v. Griffith*, 39 N. W. Rep. 538 (Neb.).

There are two theories upon which the plaintiff may recover in such a case as this: — (1) On the theory of constructive trust, where the plaintiff recovers either the land or its proceeds. (2) On the theory that the defendant must make restitution for that which he has taken from the plaintiff; that is, restore the land if he has it, if not, give its equivalent. This case, which was apparently decided upon the latter theory, says that the equivalent is the value of the land at the time it was conveyed to the *bona fide* purchaser. It may be asked, why would it not be complete restitution to give the plaintiff the present value of the land?

COPYRIGHT — ADAPTATION OF SHEET MUSIC TO ORGANETTES. — The manufacture and sale of perforated strips of paper, to be used in organettes for producing a certain tune, is not a violation of the copyrighted sheet music of the same tune. *Kennedy v. McTammany*, 33 Fed. Rep. 584 (Mass.).

CRIMINAL LAW — ASSAULT WITH INTENT TO KILL. — A nurse administered to a little child tincture of assafoetida, which she supposed to be poisonous, but was really not so. There was no direct evidence that force was used. *Held*, that she was guilty of an assault with intent to kill, and the jury was authorized to find that force was used from the fact that so small a child had drunk so nauseous a drug. *State v. Glover*, 4 S. E. Rep. 564 (S. C.).

EMINENT DOMAIN — ILLEGAL TAKING OF LAND — INTERVENTION OF PUBLIC RIGHTS. — Ejectment was brought against a railroad company which had wrongfully seized land. The owner had apparently acquiesced in the seizure for a long time. The case turned upon another point, but the court said that acquiescence until after public rights had intervened would prevent the owner from recovering the land, although acquiescence would be no bar to an action for compensation. It is no principle of estoppel which prevents recovery of the land, but public policy simply. *Indiana, B., & W. Ry. Co. v. Allen*, 15 N. E. Rep. 446 (Ind.).

ESTATES — DEED RESERVING TITLE TILL GRANTOR'S DEATH. — In consideration of personal services, A granted, bargained, sold, aliened, conveyed, and confirmed certain land to B and his heirs, the title to remain in A during his lifetime, and at his death to vest in B. *Held*, that B had an immediate estate in fee, subject to a life estate in A. *White v. Hopkins*, 4 S. E. Rep. 863 (Ga.).

EVIDENCE — ACCOUNT-BOOKS. — In an action by the administrator of the payee of a promissory note against the maker, in order to establish certain alleged payments on the note, an account-book kept by the maker himself, and containing entries of the payments in question, was offered in evidence. The maker was alive and present in court. *Held*, inadmissible. The court said: "There is no doubt that shop-books may be introduced as evidence of *sales* made or *work* done, etc., under pressure of certain necessities; but the record of payments on a debt evidenced by a bond or note of the debtor, made by the debtor himself, do not come within the rule." *Wells' Adm'r v. Ayres*, 5 S. E. Rep. 21 (Va.).

EVIDENCE — CHARACTER. — In an action against a railroad company for injuries due to the negligence of its employes, it was held that the general reputation of a flagman at a railroad crossing for carelessness is inadmissible in evidence to prove his carelessness on a particular occasion. *Baltimore & O. R. Co. v. Colvin*, 12 Atl. Rep. 337 (Pa.).

EVIDENCE — DEPOSITION — CONVICTION AND EXECUTION OF DEPONENT BEFORE SECOND TRIAL. — The deposition of one C, then confined in jail on a charge of murder, was taken and read at the trial of a civil action. On appeal, judgment was reversed and a new trial ordered. Before the second trial, C was convicted of murder and executed. *Held*, that C's deposition was inadmissible as evidence in the second trial. If C had been convicted before the second trial, but not yet executed being

infamous and unable to testify himself, his deposition would have been inadmissible. Nor did his execution give reason for admitting the deposition as proof of the testimony of a deceased witness at a former trial. The testimony of a deceased witness in a former trial is open to every objection which could be made if the witness were alive and personally offered for the first time. *St. Louis, I. N., & L. Ry. Co. v. Harper*, 6 S. W. Rep. 720 (Ark.).

EVIDENCE — OPINION. — In an action for negligently causing the death of A, the defendant, in order to show negligence on A's part, asked a witness if he did not have time to jump after he saw the train. *Held*, that, on the assumption that it was an opinion, the evidence was admissible. But the court say, "It would seem to be rather matter of fact, discernible by judgment or estimate." *Quinn v. N. Y., N. H., & H. R.R. Co.*, 12 Atl. Rep. 97 (Conn.).

In an action against a railroad company for personal injury caused by defendant's steam-shovel, the evidence was offered of the operator of the shovel, not shown to be an expert, that, after the shovel had started, "no human force could have prevented the lever, or bucket, from swinging around to its accustomed place." *Held*, admissible. Such evidence is not mere opinion, but is a summary of a number of involved facts; it is the statement of "the result of personal observation and knowledge as to a collective fact." *Alabama G. S. R.R. Co. v. Yarbrough*, 3 So. Rep. 447 (Ala.).

These two cases may be profitably compared with the cases of *Com. v. Sturtevant*, 117 Mass. 122, in which a witness, having examined with a lens a fresh blood-stain on a coat, and the stain having been since partly rubbed off, was allowed to testify that its appearance then indicated that it had fallen upon the coat from a certain direction, although the witness had never experimented with blood or any other fluid in this respect. It is said that such evidence of a common observer, testifying to the result of his observation made at the time, is not a mere opinion, but is "a conclusion of fact to which his judgment, observation, and common knowledge have led him;" its admissibility is subject to two conditions: first, that the subject-matter of the testimony is a state of things which cannot be properly reproduced or described to the jury; second, that it is a state of things which a common observer is capable of comprehending.

EVIDENCE — PERJURY — FALSE STATEMENTS AS TO DETAILS. — In a trial for perjury, in order to show the falsity of the defendant's statement assigned for perjury, evidence is admissible of the falsity of the defendant's statements as to the details of the principal statement, although such details are not assigned for perjury, and their falsity is not direct evidence of the falsity of the principal statement. *Anderson v. State*, 7 S. W. Rep. 44 (Tex.). *State v. Buie*, 43 Tex. 532, is overruled.

EQUITY JURISDICTION — CONTINUING TRESPASS. — The defendant obtained permission of plaintiff to put a few stones upon his land. In plaintiff's absence he piled boulders, fourteen feet high, upon the land, and the plaintiff asks a mandatory injunction to compel their removal.

Held, that it was a continuing trespass, and, while equity will ordinarily require the right to be tried at law first, that rule is rather one of discretion than jurisdiction, and relief will be granted. *Wheelock v. Noonan*, 15 N. E. Rep. 67 (N. Y.).

FEDERAL JURISDICTION — VENUE. — For construction and interpretation of Act of Congress of March 3, 1887, which provides that a suit between citizens of different States shall be brought only in the district where either the plaintiff or defendant resides, see *St. Louis, V., & I. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. Rep. 385 (Ill.); *Pitkin County Min. Co. v. Markell*, id. 386 (Col.); *Harold v. Iron Silver Min. Co.*, id. 529 (Col.); *Carpenter v. Talbot*, id. 537 (Vt.).

GENERAL ASSUMPSIT — PROMISSORY NOTE AS EVIDENCE OF DEBT. — A promissory note varying from the one specially pleaded is admissible under the common counts as evidence of money had and received, in connection with evidence that the defendant admitted his indebtedness on the note. *Hopkins v. Orr*, 8 Sup. Ct. Rep. 590.

This case assumes that a note does not extinguish the debt, or even suspend the remedy.

HIGHWAY — DEDICATION. — Where one, in making a deed of a piece of his land, refers as a boundary to a street laid out, but not opened, he does not thereby dedicate so much of his lands as lies within the street limits to the public. *In re Brooklyn Street*, 12 Atl. Rep. 664 (Pa.).

INSOLVENCY — PREFERRED CREDITOR — MISAPPROPRIATED FUNDS. — Plaintiff deposited certain bonds for safe-keeping with a banker, who wrongfully deposited them

as collateral security for the payment of a note of which he was maker. The bonds were applied in part payment of the note, and the banker shortly afterwards became insolvent. *Held*, that the proceeds of the bond went to increase the assets of the bank, and that plaintiff's claim should be preferred to those of general creditors. *Bowers v. Evans*, 36 N. W. Rep. 629 (Wis.).

It is questionable whether, in the above case, the facts warrant the conclusion that the proceeds of the bonds "went to increase the assets of the bank which were assigned." Wherever it is clear, however, that the fund of the assignee is greater than it would have been if there had been no misappropriation, the defrauded person is to be preferred to the amount of such excess. For collection of authorities see 1 Harv. L. Rev. 104, note.

MASTER AND SERVANT—SUPERVISING ARCHITECT—LIABILITY FOR NEGLIGENCE.—When, in the erection of a building on the defendant's premises, the work is done under the direction of a supervising architect having discretion as to the mode of doing the work, but subject to the control of the defendant, who has the ultimate power of ordering how the work shall be done, *semble*, that the defendant is liable for personal injuries to a workman, caused by negligent performance of the work. The architect in such a case is not an independent contractor. *Campbell v. Lunsford*, 3 So. Rep. 522 (Ala.).

A note cites cases on the question as to when the terms of a written contract for work are sufficient to prevent the contractor from being independent, so that the rule *respondent superior* will apply.

MISTAKE OF LAW—VOLUNTARY PAYMENT OF JUDGMENT DEBT.—Plaintiff, to avoid an execution sale, made a voluntary payment of a judgment debt. In the mean time an appeal had been entered which resulted in a reversal of the judgment. *Held*, that the payment being voluntary, plaintiff was not entitled to restitution. *Gould et ux. v. McFall*, 12 Atl. Rep. 346 (Pa.).

In support of the proposition that money voluntarily paid with a full knowledge of all the facts cannot be recovered back because the party was ignorant of, or mistook, the law as to his liability, see *County of Jefferson v. Hawkins*, 2 South. Rep. 362 (Fla.); *Baldwin v. Foss*, 32 N. W. Rep. 389 (Iowa); *Shipman v. Dist. of Columbia*, 7 Sup. Ct. Rep. 134; *Gillian v. Alford*, 6 S. W. Rep. 757 (Tex.).

PERPETUITIES—STATUTORY RULE AGAINST.—Under a statute which provides that every future estate shall be void in its creation which shall suspend the absolute power of alienation for more than two lives in being, *held*, that a clause in a will which conflicted with such statute, thus making invalid certain trusts created by the will, should be treated as a nullity. *Palms v. Palms*, 36 N. W. Rep. 419 (Mich.).

As the property was devised to trustees with a power of sale, the case is valuable as showing that the conception of the common-law rule against perpetuities, that if the future estate *may not vest* within the required limits it is void, is applied to a statutory rule which simply prohibits the suspension of the power of alienation. A statute similar to the above exists in California, Indiana, Minnesota, New York, and Wisconsin.

STATUTE OF ANOTHER STATE—HOW FAR ENFORCEABLE.—Plaintiff's intestate was killed by defendant railroad company in Michigan, where, by statute, a right of action accrued to the personal representatives of deceased. Action was brought in Indiana, where a similar statute was in force. *Held*, that a right of action arising under a statute of another State will be enforced as readily as if it arose under the common law, provided that the statute in question is not against the express provisions or the policy of the law of the State where action is brought. Cases for and against this proposition are collected. *Burns v. Grand Rapids & I. R. Co.*, 15 N. E. Rep. 230 (Ind.).

TRUSTS—RESULTING.—A conveyed land to B upon which C had a mortgage. D paid off the mortgage and directed C to convey his interest to B. *Held*, that there was no resulting trust in favor of D, because a trust will result only when consideration is furnished for a conveyance of the land itself, not when money is advanced merely to discharge an incumbrance. The court makes some interesting observations in regard to resulting trusts. "The doctrine of resulting trusts is a very difficult one; indeed, it should be swept away by legislation, and should have no resting-place in this State. It served its purpose long ago. When a man makes a deed to another, no trust being reserved in the deed, but the whole title being conveyed, with warranty, etc., no trust should result." *Boyer v. Floury*, 5 S. E. Rep. 63 (Ga.).

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THE HISTORY OF ASSUMPSIT.

II. — IMPLIED ASSUMPSIT.

NOTHING impresses the student of the Common Law more than its extraordinary conservatism. The reader will easily call to mind numerous rules in the law of Real Property and Pleading which illustrate the persistency of archaic reverence for form and of scholastic methods of interpretation. But these same characteristics will be found in almost any branch of the law by one who carries his investigations as far back as the beginning of the seventeenth century. The history of Assumpsit, for example, although the fact seems to have escaped general observation, furnishes a convincing illustration of the vitality of mediæval conceptions.

We have had occasion, in the preceding part of this paper, to see that an express *assumpsit* was for a long time essential in the actions of tort against surgeons or carpenters, and bailees. It also appeared that in the action of tort for a false warranty the vendor's affirmation as to quality or title was not admissible, before the time of Lord Holt, as a substitute or an express undertaking. We are quite prepared, therefore, to find that the action of Assumpsit proper was, for generations, maintainable only upon an express promise. Furthermore, Assumpsit would not lie in certain cases even though there were an express promise. For example, a defendant who promised to pay a sum certain in ex-

change for a *quid pro quo* was, before Slade's case,¹ chargeable only in Debt unless he made a second promise to pay the debt.

It was only by degrees that the scope of the action was enlarged. The extension was in three directions. In the first place, *Indebitatus Assumpsit* became concurrent with Debt upon a simple contract in all cases. Secondly, proof of a promise implied in fact, that is, a promise inferred from circumstantial evidence, was at length deemed sufficient to support an action. Finally, *Indebitatus Assumpsit* became the appropriate form of action upon constructive obligations, or quasi-contracts for the payment of money. These three developments will be considered separately.

Although *Indebitatus Assumpsit* upon an express promise was valuable so far as it went, it could not be resorted to by plaintiffs in the majority of cases as a protection from wager of law by their debtors. For the promise to be proved must not only be express, but subsequent to the debt. In an anonymous case, in 1572, Manwood objected to the count that the plaintiff "ought to have said *quod postea assumpsit*, for if he assumed at the time of the contract, then Debt lies, and not Assumpsit; but if he assumed after the contract, then an action lies upon the *assumpsit*, otherwise not, *quod* Whiddon and Southcote, JJ., with the assent of Catlin, C.J., *concesserunt*." ² The consideration in this class of cases was accordingly described as a "debt precedent." ³ The necessity of a subsequent promise is conspicuously shown by the case of Maylard *v.* Kester.⁴ The allegations of the count were, that, in consideration that the plaintiff would sell and deliver to the defendant certain goods, the latter promised to pay therefor a certain price; that the plaintiff did sell and deliver the goods, and that the defendant did not pay according to his promise and undertaking. The plaintiff had a verdict and judgment thereon in the Queen's Bench; but the judgment was reversed in the Exchequer Chamber "because Debt lies properly, and not an action on the case; the matter proving a perfect sale and contract."

What was the peculiar significance of the subsequent promise? Why should the same courts which, for sixty years before Slade's case, sanctioned the action of Assumpsit upon a promise in consideration of a precedent debt, refuse, during the same period, to

¹ 4 Rep. 92 a.

² Dal. 84, pl. 35.

³ Manwood *v.* Burston, 2 Leon. 203, 204; *supra*, 16, 17.

⁴ Moore, 711 (1601).

allow the action, when the receipt of the *quid pro quo* was contemporaneous with or subsequent to the promise? The solution of this puzzle must be sought, it is believed, in the nature of the action of Debt. A simple contract debt, as well as a debt by specialty, was originally conceived of, not as a contract, in the modern sense of the term, that is, as a promise, but as a grant.¹ A bargain and sale, and a loan, were exchanges of values. The action of debt, as several writers have remarked, was a real rather than a personal action. The judgment was not for damages, but for the recovery of a debt, regarded as a *res*. The conception of a debt was clearly expressed by Vaughan, J., who, some seventy years after Slade's case, spoke of the action of Assumpsit as "much inferior and ignobler than the action of Debt," and characterized the rule that every contract executory implies a promise as "a false gloss, thereby to turn actions of Debt into actions on the case; for contracts of debt are reciprocal grants."²

Inasmuch as the simple contract debt had been created from time immemorial by a promise or agreement to pay a definite amount of money in exchange for a *quid pro quo*, the courts could not allow an action of Assumpsit also upon such a promise or agreement, without admitting that two legal relations, fundamentally distinct, might be produced by one and the same set of words. This implied a liberality of interpretation to which the lawyers of the sixteenth century had not generally attained. To them it seemed more natural to consider that the force of the words of agreement was spent in creating the debt. Hence the necessity of a new promise, if the creditor desired to charge his debtor in Assumpsit.

As the actions of Assumpsit multiplied, however, it would naturally become more and more difficult to discriminate between promises to pay money and promises to do other things. The recognition of an agreement to pay money for a *quid pro quo* in its double aspect, that is, as being both a grant and a promise, and the consequent admissibility of Assumpsit, with its procedural advantages, as a concurrent remedy with Debt were inevitable. It was accordingly resolved by all the justices and barons in Slade's case, in 1603, although "there was no other promise or assumption but the said bargain," that "every contract executory imports

¹ See Langdell, Contracts, § 100.

² *Edgecomb v. Dee, Vaugh.* 89, 101.

in itself an *assumpsit*, for when one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay or deliver it; and, therefore, when one sells any goods to another, and agrees to deliver them at a day to come, and the other, in consideration thereof, agrees to pay so much money at such a day, in that case both parties may have an action of Debt, or an action on the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case as well as actions of Debt." Inasmuch as the judges were giving a new interpretation to an old transaction; since they, in pursuance of the presumed intention of the parties, were working out a promise from words of agreement which had hitherto been conceived of as sounding only in grant, it was not unnatural that they should speak of the promise thus evolved as an "implied *assumpsit*." But the promise was in no sense a fiction. The fictitious *assumpsit*, by means of which the action of *Indebitatus Assumpsit* acquired its greatest expansion, was an innovation many years later than Slade's case.

The account just given of the development of *Indebitatus Assumpsit*, although novel, seems to find confirmation in the parallel development of the action of Covenant. Strange as it may seem, Covenant was not the normal remedy upon a covenant to pay a definite amount of money or chattels. Such a covenant being regarded as a grant of the money or chattels, Debt was the appropriate action for their recovery. The writer has discovered no case in which a plaintiff succeeded in an action of Covenant, where the claim was for a sum certain, antecedent to the seventeenth century; but in an action of Debt upon such a claim, in the Queen's Bench, in 1585, "it was holden by the Court that an action of Covenant lay upon it, as well as an action of Debt, at the election of the plaintiff."¹ The same right of election was conceded by the Court in two cases² in 1609, in terms which indicate that the privilege was of recent introduction. It does not appear in what court these cases were decided; but it seems probable that they were in the King's Bench, for, in *Chawner v. Bowes*,³ in the Common Bench, four years later, Warburton and Nichols, JJ., said: "If a man covenant to pay £10 at a day certain, an action of debt

¹ Anon., 3 Leon. 119.

² Anon., 1 Roll. Ab. 518, pl. 3; *Strong v. Watts*, 1 Roll. Ab. 518, pl. 2. See also *Mordant v. Watts*, Brownl. 19; Anon., Sty. 31; *Frere v. —*, Sty. 133; *Norrice's Case*, Hard. 178.

³ Godb. 217.

lieth for the money, and not an action of covenant." As late as 1628, in the same court, Berkeley, Serjeant, in answer to the objection that Covenant did not lie, but Debt, against a defendant who had covenanted to perform an agreement, and had obliged himself in a certain sum for its performance, admitted that, "if a covenant had been for £30, then debt only lies; but here it is to perform an agreement."¹ Precisely when the Common Bench adopted the practice of the King's Bench it is, perhaps, impossible to discover; but the change was probably effected before the end of the reign of Charles I.

That Covenant became concurrent with Debt on a specialty so many years after Assumpsit was allowed as a substitute for Debt on a simple contract, was doubtless due to the fact that there was no wager of law in Debt on a sealed obligation.

Although the right to a trial by jury was the principal reason for a creditor's preference for *Indebitatus Assumpsit*, the new action very soon gave plaintiffs a privilege which must have contributed greatly to its popularity. In declaring in Debt, except possibly upon an account stated, the plaintiff was required to set forth his cause of action with great particularity. Thus, the count in Debt must state the quantity and description of goods sold, with the details of the price, all the particulars of a loan, the names of the persons to whom money was paid with the amounts of each payment, the names of the persons from whom money was received to the use of the plaintiff with the amounts of each receipt, the precise nature and amount of services rendered. In *Indebitatus Assumpsit*, on the other hand, the debt being laid as an inducement or conveyance to the *assumpsit*, it was not necessary to set forth all the details of the transaction from which it arose. It was enough to allege the general nature of the indebtedness, as for goods sold,² money lent,³ money paid at the defendant's request,⁴ money had and received to the plaintiff's use,⁵ work and labor at the defendant's request,⁶ or upon an account stated,⁷ and that the

¹ *Brown v. Hancock*, Hetl. 110, 111.

² *Hughes v. Rowbotham* (1592), Poph. 30, 31; *Woodford v. Deacon* (1608), Cro. Jac. 206; *Gardiner v. Bellingham* (1612), Hob. 5, 1 Roll. R. 24, s. c.

³ *Rooke v. Rooke* (1610), Cro. Jac. 245, Yelv. 175, s. c.

⁴ *Rooke v. Rooke*, *supra*; *Moore v. Moore* (1611), 1 Bulst. 169.

⁵ *Babington v. Lambert* (1616), Moore, 854.

⁶ *Russell v. Collins* (1669), 1 Sid. 425, 1 Mod. 8, 1 Vent. 44, 2 Keb. 552, s. c.

⁷ *Brinsley v. Partridge* (1611), Hob. 88; *Vale v. Egles* (1605), Yelv. 70, Cro. Jac. 69.

defendant being so indebted promised to pay. This was the origin of the common counts.

In all the cases thus far considered there was a definite bargain or agreement between the plaintiff and defendant. But instances, of course, occurred in which the parties did not reduce their transactions to the form of a distinct bargain. Services would be rendered, for example, by a tailor or other workman, an innkeeper or common carrier, without any agreement as to the amount of compensation. Such cases present no difficulty at the present day, but for centuries there was no common-law action by which compensation could be recovered. Debt could not be maintained, for that action was always for the recovery of a liquidated amount.¹ Assumpsit would not lie for want of a promise. There was confessedly no express promise; to raise by implication a promise to pay as much as the plaintiff reasonably deserved for his goods or services was to break with the most venerable traditions. The lawyer of to-day, familiar with the ethical character of the law as now administered, can hardly fail to be startled when he discovers how slowly the conception of a promise implied in fact, as the equivalent of an express promise, made its way in our law.

There seems to have been no recognition of the right to sue upon an implied *quantum meruit* before 1609. The innkeeper was the first to profit by the innovation. Reciprocity demanded that, if the law imposed a duty upon the innkeeper to receive and keep safely, it should also imply a promise on the part of the guest to pay what was reasonable.² The tailor was in the same case with the innkeeper, and his right to recover upon a *quantum meruit* was recognized in 1610.³ Sheppard,⁴ citing a case of the year 1632, says: "If one bid me do work for him, and do not promise anything for it; in that case the law implieth the promise, and I may sue for the wages." But it was only four years before that the

¹ "If I bring cloth to a tailor to have a cloak made, if the price is not ascertained beforehand that I shall pay for the work, he shall not have an action against me." Y. B. 12 Ed. IV. 9, pl. 22, per Brian, C. J. To the same effect, *Young v. Ashburnham* (1587), 3 Leon. 161; *Mason v. Welland* (1688), Skin. 238, 242.

² "It is an implied promise of every part, that is, of the part of the innkeeper, that he will preserve the goods of his guest, and of the part of the guest, that he will pay all duties and charges which he caused in the house." *Warbrooke v. Griffin*, 2 Brownl. 254, Moore, 876, 877, s. c.

³ *Six Carpenters' Case*, 8 Rep. 147 a. But the statement that the tailor could recover in Debt is contradicted by precedent and following authorities.

⁴ *Actions on the Case* (2 ed.), 50.

Court in a similar case were of opinion that an action lay if the party either before or after the services rendered promised to pay for them, "but not without a special promise."¹ In *Nichols v. More*² (1661) a common carrier resisted an action for negligence, because, no price for the carriage being agreed upon, he was without remedy against the bailor. The Court, however, answered that "the carrier may declare upon a *quantum meruit* like a tailor, and therefore shall be charged."³ As late as 1697, Powell, J., speaking of the sale of goods for so much as they were worth, thought it worth while to add: "And note the very taking up of the goods implies such a contract."⁴

The right of one, who signed a bond as surety for another without insisting upon a counter bond or express promise to save harmless, to charge his principal upon an implied contract of indemnity, was developed nearly a century later. In *Bosden v. Thinne*⁵ (1603) the plaintiff at the defendant's request had executed a bond as surety for one F, and had been cast in a judgment thereon. The judges all agreed that upon the first request only Assumpsit did not lie, Yelverton, J., adding: "For a bare request does not imply any promise, as if I say to a merchant, I pray trust J. S. with £100, and he does so, this is of his own head, and he shall not charge me, unless I say I will see you paid, or the like." The absence of any remedy at law was conceded in 1662.⁶ It was said by Buller, J., in *Toussaint v. Martinnant*,⁷ "that the first case in which a surety, who had paid the creditor, succeeded in an action at law against the principal for indemnity, was before Gould, J.,⁸ at Dorchester, which was decided on equitable grounds." The innovation seems to be due, however, to Lord Mansfield, who ruled in favor of a surety in *Decker v. Pope*, in 1757, "observing that when a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law."⁹

The late development of the implied contract to pay *quantum*

¹ *Thursby v. Warren*, W. Jones, 208.

² 1 Sid. 36. See also *Boson v. Sandford* (1689), per Eyres, J.

³ The defendant's objection was similar to the one raised in Y. B. 3 H. VI. 36, pl. 33, *supra*, 11, n. 2.

⁴ *Hayward v. Davenport*, Comb. 426.

⁵ Yelv. 40.

⁶ *Scott v. Stephenson*, 1 Lev. 71, 1 Sid. 89, s. c. But see Shepp. Act on Case (2 ed.) 49.

⁷ 2 T. R. 100, 105.

⁸ Justice of the Common Pleas, 1763-1794.

⁹ 1 Sel. N. P. (13 ed.) 91.

meruit, and to indemnify a surety, would be the more surprising, but for the fact that Equity gave relief to tailors and the like, and to sureties long before the common law helped them. Spence, although at a loss to account for the jurisdiction, mentions a suit brought in Chancery, in 1567, by a tailor, to recover the amount due for clothes furnished. The suit was referred to the queen's tailor, to ascertain the amount due, and upon his report a decree was made. The learned writer adds that "there were suits for wages and many others of like nature."¹ A surety who had no counter bond filed a bill against his principal, in 1632, in a case which would seem to have been one of the earliest of the kind, for the reporter, after stating that there was a decree for the plaintiff, adds "*quod nota.*"²

The account just given of the promise implied in fact seems to throw much light upon the doctrine of "executed consideration." One who had incurred a detriment at the request of another, by rendering service, or by becoming a surety with the reasonable expectation of compensation or indemnity, was as fully entitled, in point of justice, to enforce his claim at law, as one who had acted in a similar way upon the faith of an express promise. Nothing was wanting but an express *assumpsit* to make a perfect cause of action. If the defendant saw fit to make an express *assumpsit*, even after the detriment was incurred, the temptation to treat this as removing the technical objection to the plaintiff's claim at law might be expected to be, as it proved to be, irresistible.³ The already established practice of suing upon a promise to pay a precedent debt made it the more easy to support an action upon a promise when the antecedent act of the plaintiff at the defendant's request did not create a strict debt.⁴ To bring the new doctrine into harmony with the accepted theory of consideration, the promise was "coupled with" the prior request by the fiction of relation,⁵ or, by a similar fiction, the consideration was brought forward or continued to the promise.⁶ This fiction doubt-

¹ 1 Spence, Eq. Jur. 694.

² Ford v. Stobridge, Nels. Ch. 24.

³ The view here suggested is in accordance with what has been called, in a questioning spirit, the "ingenious explanation" of Professor Langdell. Holmes, Common Law, 286. The general tenor of this paper will serve, it is hoped, to remove the doubts of the learned critic.

⁴ Sidenham v. Worlington (1585), 2 Leon. 224.

⁵ Langdell, Contracts, § 92.

⁶ Langdell, Contracts, § 92; 1 Vin. Ab. 280, pl. 13.

less enabled plaintiffs sometimes to recover, although the promise was not identical with what would be implied, and in some cases even where it would be impossible to imply any promise.¹ But after the conception of a promise implied in fact was recognized and understood, these anomalies gradually disappeared, and the subsequent promise came to be regarded in its true light of cogent evidence of what the plaintiff deserved for what he had done at the defendant's request.

The non-existence of the promise implied, in fact, in early times, also makes intelligible a distinction in the law of lien, which greatly puzzled Lord Ellenborough and his colleagues. Williams, J., is reported to have said in 1605: "If I put my cloths to a tailor to make up, he may keep them till satisfaction for the making. But if I contract with a tailor that he shall have so much for the making of my apparel, he cannot keep them till satisfaction for the making."² In the one case, having no remedy by action, he was allowed a lien, to prevent intolerable hardship. In the other, as he had a right to sue on the express agreement, it was not thought necessary to give him the additional benefit of a lien.³ As soon as the right to recover upon an implied *quantum meruit* was admitted, the reason for this distinction vanished. But the acquisition of a new remedy by action did not displace the old remedy by lien.⁴ The old rule, expressed, however, in the new form of a distinction between an express and an implied contract, survived to the present century.⁵ At length, in 1816, the judges of the King's Bench, unable to see any reason in the distinction, and unconscious of its origin, declared the old *dicta* erroneous, and allowed a miller his lien in the case of an express contract.⁶

¹ Langdell, Contracts, §§ 93, 94.

² 2 Roll. Ab. 92, pl. 1, 2.

³ An innkeeper had the further right of selling a horse as soon as it had eaten its value, if there were no express contract. For, as he had no right of action for its keep, the horse thereafter was like a *damnosa hereditas*. The Hostler's case (1605), Yelv. 66, 67. This right of sale disappeared afterwards with the reason upon which it was founded. Jones v. Pearle, 1 Stra. 556.

⁴ "And it was resolved that an innkeeper may detain a horse for his feeding, and yet he may have an action on the case for the meat." Watbrooke v. Griffith (1609), Moore, 876, 877.

⁵ Chapman v. Allen, Cro. Car. 271; Collins v. Ongly, Selw. N. P. (13 ed.) 1312, n. (x), per Lord Holt; Brennan v. Currant (1755), Say. 224, Buller, N. P. (7 ed.) 45, n. (c); Cowell v. Simpson, 16 Ves. 275, 281, per Lord Eldon; Scarfe v. Morgan, 4 M. & W. 270, 283, per Parke, B.

⁶ Chase v. Westmore, 5 M. & Sel. 180.

The career of the agistor's lien is also interesting. That such a lien existed before the days of implied contracts is intrinsically probable, and is also indicated by several of the books.¹ But in *Chapman v. Allen*² (1632), the first reported decision involving the agistor's right of detainer, there happened to be an express contract, and the lien was accordingly disallowed. When a similar case arose two centuries later in *Jackson v. Cummins*,³ this precedent was deemed controlling, and, as the old distinction between express and implied contracts was no longer recognized, the agistor ceased to have a lien in any case. Thus was established the modern and artificial distinction in the law of lien between bailees for agistment and "bailees who spend their labor and skill in the improvement of the chattels" delivered to them.⁴

The value of the discovery of the implied promise in fact was exemplified further in the case of a parol submission to an award. If the arbitrators awarded the payment of a sum of money, the money was recoverable in debt, since an award, after the analogy of a judgment, created a debt. But if the award was for the performance of a collateral act, as, for example, the execution of a release, there was, originally, no mode of compelling compliance with the award, unless the parties expressly promised to abide by the decision of the arbitrators. *Tilford v. French*⁵ (1663) is a case in point. So, also, seven years later, "it was said by Twisden, J., that if two submit to an award, this contains not a reciprocal promise to perform; but there must be an express promise to ground an action upon."⁶ This doctrine was abandoned by the time of Lord Holt, who, after referring to the ancient rule, said: "But the contrary has been held since; for if two men submit to the award of a third person, they do also thereby promise expressly to abide by this determination, for agreeing to refer is a promise in itself."⁷

¹ 2 Roll. Ab. 85, pl. 4 (1604); *Mackerney v. Erwin* (1628), Hutt. 101; *Chapman v. Allen* (1632), 2 Roll. Ab. 92, pl. 6, Cro. Car. 271, s. c.

² 2 Roll. Ab. 92, pl. 6, Cro. Car. 271, s. c.

³ 5 M. & W. 342.

⁴ The agistor has a lien by the Scotch law. Schouler, *Bailments* (2 ed.), § 122.

⁵ 1 Lev. 113, 1 Sid. 160, 1 Keb. 599, 635. To the same effect, *Penruddock v. Montague* (1612), 1 Roll. Ab. 7, pl. 3; *Browne v. Downing* (1620), 2 Roll. R. 194; *Read v. Palmer* (1648), Al. 69, 70.

⁶ Anon., 1 Vent. 69.

⁷ *Squire v. Grevell* (1703), 6 Mod. 34, 35. See similar statements by Lord Holt in *Allen v. Harris* (1695), 1 Ld. Ray. 122; *Freeman v. Barnard* (1696), 1 Ld. Ray. 248; *Purslow v. Baily* (1704), 2 Ld. Ray. 1039; *Lupart v. Welson* (1708), 11 Mod. 171.

In the cases already considered the innovation of Assumpsit upon a promise implied in fact gave a remedy by action, where none existed before. In several other cases the action upon such a promise furnished not a new, but a concurrent remedy. Assumpsit, as we have seen,¹ was allowed, in the time of Charles I., in competition with Detinue and Case against a bailee for custody. At a later period Lord Holt suggested that one might "turn an action against a common carrier into a special assumpsit (which the law implies) in respect of his hire."² *Dale v. Hall*³ (1750) is understood to have been the first reported case in which that suggestion was followed. Assumpsit could also be brought against an innkeeper.⁴

Account was originally the sole form of action against a factor or bailiff. But in *Wilkins v. Wilkins*⁵ (1689) three of the judges favored an action of Assumpsit against a factor because the action was brought upon an express promise, and not upon a promise by implication. Lord Holt, however, in the same case, attached no importance to the distinction between an express and an implied promise, remarking that "there is no case where a man acts as bailiff, but he promises to render an account." The requisite of an express promise was heard of no more. Assumpsit became theoretically concurrent with Account against a bailiff or factor in all cases, although by reason of the competing jurisdiction of equity, actions at common law were rare.⁶

In the early cases of bills and notes the holders declared in an action on the case upon the custom of merchants. "Afterwards they came to declare upon an *assumpsit*."⁷

It remains to consider the development of *Indebitatus Assumpsit* as a remedy upon quasi-contracts, or, as they have been commonly called, contracts implied in law. The contract implied in fact, as we have seen, is a true contract. But the obligation created by law is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor. It resembles the true contract, however, in one important particular. The duty of the obligor is a positive one, that is, to act. In this respect they both differ

¹ *Supra*, 7.

² Comb. 334.

³ 1 Wils. 281. See, also, *Brown v. Dixon*, 1 T. R. 274, per Buller, J.

⁴ *Morgan v. Ravey*, 6 H. & N. 265. But see *Stanley v. Bircher*, 78 Mo. 245.

⁵ Carth. 89, 1 Salk. 9.

⁶ *Tompkins v. Willshaer*, 5 Taunt. 430.

⁷ *Milton's Case* (1668), Hard. 485, per Lord Hale.

from obligations, the breach of which constitutes a tort, where the duty is negative, that is, to forbear. Inasmuch as it has been customary to regard all obligations as arising either *ex contractu* or *ex delicto*, it is readily seen why obligations created by law should have been treated as contracts. These constructive duties are more aptly defined in the Roman law as obligations *quasi ex contractu* than by our ambiguous "implied contracts."¹

Quasi-contracts are founded (1) upon a record, (2) upon a statutory, official, or customary duty, or (3) upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another.

As *Assumpsit* cannot be brought upon a record, the first class of quasi-contracts need not be considered here. Many of the statutory, official, or customary duties, also, *e. g.*, the duty of the innkeeper to entertain,² of the carrier to carry,³ of the smith to shoe,⁴ of the chaplain to read prayers, of the rector to keep the rectory in repair,⁵ of the *fidei-commiss* to maintain the estate,⁶ of the finder to keep with care,⁷ of the sheriff and other officers to perform the functions of their office,⁸ of the ship-owner to keep medicines on his ship,⁹ and the like, which are enforced by an action on the case, are beyond the scope of this essay, since *Indebitatus Assumpsit* lies only where the duty is to pay money. For the same reason we are not concerned here with a large class of duties growing out of the principle of unjust enrichment, namely, constructive or quasi trusts, which are enforced, of course, only in equity.

Debt was originally the remedy for the enforcement of a statutory or customary duty for the payment of money. The right to sue in *Indebitatus Assumpsit* was gained only after a struggle. The *assumpsit* in such cases was a pure fiction. These cases were not, therefore, within the principle of *Slade's case*, which required, as we have seen,¹⁰ a genuine agreement. The authorities leave no room for doubt upon this point, although it is a common opinion

¹ In *Finch, Law*, 150, they are called "as it were" contracts.

² *Keil*, 50, pl. 4.

³ *Jackson v. Rogers*, 2 Show. 327; *Anon.*, 12 Mod. 3.

⁴ *Steinson v. Heath*, Lev. 400.

⁵ *Bryan v. Clay*, 1 E. & B. 38.

⁶ *Batthyany v. Walford*, 36 Ch. Div. 269.

⁷ *Story, Bailments* (8 ed.), §§ 85-87.

⁸ 3 Bl. Com. 165.

⁹ *Couch v. Steel*, 3 E. & B. 402.

¹⁰ *Supra*, 55, 56.

But see *Atkinson v. Newcastle Co.*, 2 Ex. Div. 441.

that, from the time of that case, *Indebitatus Assumpsit* was concurrent with Debt in all cases, unless the debt was due by record, specialty, or for rent.

The earliest reported case of *Indebitatus Assumpsit* upon a customary duty seems to be *City of London v. Goree*,¹ decided seventy years later than Slade's case. "Assumpsit for money due by custom for scavage. Upon *non-Assumpsit* the jury found the duty to be due, but that no promise was expressly made. And whether Assumpsit lies for this money thus due by custom, without express promise, was the question. Resolved it does." On the authority of that case, an officer of a corporation was charged in Assumpsit, three years later, for money forfeited under a by-law.² So, also, in 1688, a copyholder was held liable in this form of action for a customary fine due on the death of the lord, although it was objected "that no *Indebitatus Assumpsit* lieth where the cause of action is grounded on a custom."³ Lord Holt had not regarded these extensions of *Indebitatus Assumpsit* with favor. Accordingly, in *York v. Toun*,⁴ when the defendant urged that such an action would not lie for a fine imposed for not holding the office of sheriff, "for how can there be any privity of assent implied when a fine is imposed on a man against his will?" the learned judge replied: "We will consider very well of this matter; it is time to have these actions redressed. It is hard that customs, by-laws, rights to impose fines, charters, and everything, should be left to a jury." By another report of the same case,⁵ "Holt seemed to incline for the defendant. . . . And upon motion of the plaintiff's counsel, that it might stay till the next term, Holt, C.J., said that it should stay till dooms-day with all his heart; but Rokesby, J., seemed to be of opinion that the action would lie. — *Et adjournatur*. Note. A day or two after I met the Lord Chief Justice Treby visiting the Lord Chief Justice Holt at his house, and Holt repeated the said case to him, as a new attempt to extend the *Indebitatus Assumpsit*, which had been too much encouraged already, and Treby, C.J., seemed also to be of the same opinion with Holt."

¹ Lev. 174, 1 Vent. 298, 3 Keb. 677, Freem. 433, s.c.

² *Barber Surgeons v. Pelson* (1679), 2 Lev. 252. To the same effect, *Mayor v. Hunt* (1681), 37, Assumpsit for weighage; *Duppa v. Gerard* (1688), 1 Show. 78, Assumpsit for fees of knighthood.

³ *Shuttleworth v. Garrett*, Comb. 151, 1 Show. 35, Carth. 90, 3 Mod. 240, 3 Lev. 261, s. c.

⁴ 5 Mod. 444.

⁵ 1 Ld. Ray. 502.

But Rokesby's opinion finally prevailed. The new action continued to be encouraged. Assumpsit was allowed upon a foreign judgment in 1705,¹ and the "metaphysical notion"² of a promise implied in law became fixed in our law.

The equitable principle which lies at the foundation of the great bulk of quasi-contracts, namely, that one person shall not unjustly enrich himself at the expense of another, has established itself very gradually in the Common Law. Indeed, one seeks in vain to-day in the treatises upon the Law of Contract for an adequate account of the nature, importance, and numerous applications of this principle.³

The most fruitful manifestations of this doctrine in the early law are to be found in the action of Account. One who received money from another to be applied in a particular way was bound to give an account of his stewardship. If he fulfilled his commission, a plea to that effect would be a valid discharge. If he failed for any reason to apply the money in the mode directed, the auditors would find that the amount received was due to the plaintiff, who would have a judgment for its recovery. If, for example, the money was to be applied in payment of a debt erroneously supposed to be due from the plaintiff to the defendant, either because of a mutual mistake, or because of fraudulent representations of the defendant, the intended application of the money being impossible, the plaintiff would recover the money in Account.⁴ Debt would also lie in such cases, since, at an early period, Debt became concurrent with Account, when the object of the action was to recover the precise amount received by the defendant.⁵ By means of the fiction of a promise implied in law *Indebitatus Assumpsit* became concurrent with Debt, and thus was established the familiar action of Assumpsit for money had and received to recover money paid to the defendant by mistake. *Bonnel v. Fowke*⁶ (1657) is, perhaps, the first action of the kind.

¹ *Dupleix v. De Rover*, 2 Vern. 540. ² *Starke v. Cheeseman*, 1 Ld. Ray. 538.

³ The readers of this Review will be interested to learn that this gap in our legal literature is about to be filled by Professor Keener's "Cases on the Law of Quasi-Contracts."

⁴ *Hewer v. Bartholomew* (1597), Cro. El. 614; *Anon.* (1696), Comb. 447; *Cavendish v. Middleton*, Cro. El. 141, W. Jones, 196, s.c.

⁵ *Lincoln v. Topliff* (1597), Cro. El. 644.

⁶ 2 Sid. 4. To the same effect, *Martin v. Sitwell* (1690), 1 Show. 156, Holt, 25; *Newdigate v. Dary* (1692), 1 Ld. Ray. 742; *Palmer v. Staveley* (1700), 12 Mod. 510.

Although Assumpsit for money had and received was in its infancy merely a substitute for Account, it gradually outgrew the limits of that action. Thus, if one was induced by fraudulent representations to buy property, the purchase-money could not be recovered from the fraudulent vendor by the action of Account. For a time, also, *Indebitatus Assumpsit* would not lie in such a case. Lord Holt said in 1696: "But where there is a bargain, though a corrupt one, or where one sells goods that were not his own, I will never allow an *indebitatus*."¹ His successors, however, allowed the action. Similarly, Account was not admissible for the recovery of money paid for a promise which the defendant refused to perform. Here, too, Debt and *Indebitatus Assumpsit* did not at once transcend the bounds of the parent action.² But in 1704 Lord Holt reluctantly declined to nonsuit a plaintiff who had in such a case declared in *Indebitatus Assumpsit*.³ Again, Account could not be brought for money acquired by a tort, for example, by a disseisin and collection of rents or a conversion and sale of a chattel.⁴ It was decided, accordingly, in *Philips v. Thompson*⁵ (1675), that Assumpsit would not lie for the proceeds of a conversion. But in the following year the usurper of an office was charged in Assumpsit for the profits of the office, no objection being taken to the form of action.⁶ Objection was made in a similar case in 1677, that there was no privity and no contract; but the Court, in disregard of all the precedents of Account, answered: "An *Indebitatus Assumpsit* will lie for rent received by one who pretends a title; for in such cases an Account will lie. Wherever the plaintiff may have an Account an *indebitatus* will lie."⁷ These precedents were deemed conclusive in *Howard v. Wood*⁸ (1678), but Lord Scroggs remarked: "If this were now an original case, we are agreed it would by no means lie." Assumpsit soon became concurrent with Trover, where the goods had been sold.⁷

¹ Anon. Comb. 447.

² Brig's Case (1623), Palm. 364; Dewbery v. Chapman (1695), Holt. 35; Anon. (1696), Comb. 447.

³ Holmes v. Hall, 6 Mod. 161, Holt. 36, s. c. See, also, Dutch v. Warren (1720), 1 Stra. 406, 2 Burr. 1010, s. c.; Anon., 1 Stra. 407.

⁴ Tottenham v. Bedingfield (1572), Dal. 99, 3 Leon. 24, Ow., 35, 83, s. c. Accordingly, an account of the profits of a tort cannot be obtained in equity to-day except as an incident to an injunction.

⁵ 3 Lev. 191.

⁶ Woodward v. Aston, 2 Mod. 95.

⁷ Arris v. Stukely, 2 Mod. 260.

⁸ 2 Show. 23, 2 Lev. 245, Freem. 473, 478, T. Jones, 126, s. c.; Jacob v. Allen (1703), 1 Salk. 27; Lamine v. Dorell (1705), 2 Ld. Ray. 1216. Phillips v. Thompson, *supra*, was overruled in Hitchens v. Campbell, 2 W. Bl. 827.

Finally, under the influence of Lord Mansfield, the action was so much encouraged that it became almost the universal remedy where a defendant had received money which he was "obliged by the ties of natural justice and equity to refund."¹

But one is often bound by those same ties of justice and equity to pay for an unjust enrichment enjoyed at the expense of another, although no money has been received. The quasi-contractual liability to make restitution is the same in reason, whether, for example, one who has converted another's goods turns them into money or consumes them. Nor is any distinction drawn, in general, between the two cases. In both of them the claim for the amount of the unjust enrichment would be provable in the bankruptcy of the wrong-doer as an equitable debt,² and would survive against his representative.³ Nevertheless, the value of the goods consumed was never recoverable in *Indebitatus Assumpsit*. There was a certain plausibility in the fiction by which money acquired as the fruit of misconduct was treated as money received to the use of the party wronged. But the difference between a sale and a tort was too radical to permit the use of Assumpsit for goods sold and delivered where the defendant had wrongfully consumed the plaintiff's chattels.

The same difficulty was not felt in regard to the quasi-contractual claim for the value of services rendered. The averment, in the count in Assumpsit, of an indebtedness for work and labor was proved, even though the work was done by the plaintiff or his servants under the compulsion of the defendant. Accordingly, a defendant, who enticed away the plaintiff's apprentice and employed him as a mariner, was charged in this form of action for the value of the apprentice's services.⁴

By similar reasoning, Assumpsit for use and occupation would be admissible for the benefit received from a wrongful occupation of the plaintiff's land. But this count, for special reasons connected with the nature of rent, was not allowed upon a quasi-contract.⁵

In Assumpsit for money paid the plaintiff must make out a payment at the defendant's request. This circumstance prevented

¹ *Moses v. MacFerlan*, 2 Burr. 1005, 1012.

² *Ex p. Adams*, 8 Ch. Div. 807, 819.

³ *Phillips v. Homfray*, 24 Ch. Div. 439.

⁴ *Lightly v. Clouston*, 1 Taunt. 112. See, also, *Gray v. Hill, Ry. & M.* 420.

⁵ But see *Mayor v. Sanders*, 3 B. & Ad. 411.

for a long time the use of this count in the case of quasi-contracts. Towards the end of the last century, however, the difficulty was overcome by the convenient fiction that the law would imply a request whenever the plaintiff paid, under legal compulsion, what the defendant was legally compellable to pay.¹

The main outlines of the history of Assumpsit have now been indicated. In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded Debt, became concurrent with Account, with Case upon a bailment, a warranty, and bills of exchange, and competed with Equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment. Surely it would be hard to find a better illustration of the flexibility and power of self-development of the Common Law.

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¹ *Turner v. Davies* (1796), 2 Esp. 476; *Cowell v. Edwards* (1800), 2 B. & P. 268; *Craythorne v. Swinburne* (1807), 14 Ves. 160, 164; *Exall v. Partridge* (1799), 8 T. R. 308.

THE LIMITS OF SOVEREIGNTY.

AMONG the theories of jurists, there is, perhaps, none which has been a battle-ground for so long a time, as that which relates to the limits of sovereign power. For two centuries and a half the writers who maintained that sovereignty is in its nature unlimited, and those who contended that man is endowed with certain natural rights which the State cannot legally invade, waged against each other a continual war; the former, in England, being found among the partisans of monarchy, the latter, in the ranks of those who favored the popular cause. But now, just at the moment when democracy is carrying everything before it, and the advocates of the natural rights of man appear to have triumphed, there has come a sudden change of principle, and the victors, adopting the opinions of the vanquished, are almost universally convinced that the authority of the sovereign, from its very nature, can be subject to no limitation or restraint.

This change of theory is far from accidental, and may be traced to two entirely distinct causes, of which one has acted with great force upon the mass of the community, while the other has produced an effect even more striking upon the minds of scholars. So long as the reins of government were in the hands of a king, it was natural that the advocates of popular rights should seek to restrain his power, but after the people had obtained control of the State, it was not to be expected that they would show the same respect for principles which fettered the exercise of their own authority. The ascendancy of the popular party had, therefore, an inevitable tendency to upset those doctrines which were designed to limit the exercise of power by others. Now, it was during the period when democracy was beginning to prevail, that Bentham's treatise on legislation,¹ and Austin's work on jurisprudence, attracted the serious attention of scholars; the first of these writers proclaiming the greatest happiness of the greatest number

¹ Bentham, as will be seen in the following pages, far from teaching the doctrine that the power of the sovereign is unlimited, distinctly repudiated it, and yet there can be no doubt that his principles, by undermining the old notion of natural rights, materially helped to establish that doctrine.

as the sole and final test of legislation, while the second developed, in a new form, the doctrine that sovereignty is essentially incapable of limitation, and by the clearness and force of his logic, obtained a mastery over the legal thought of English-speaking people, which has never been equalled in the history of the race. No doubt the increasing strength of democracy has helped to make Austin's views upon sovereignty prevail; but this alone would not account for the power with which his theories have stamped themselves upon all subsequent legal speculation, and, in fact, the many criticisms upon this work, however correct some of them may have been, have served to bring into brighter light the ascendancy of his mind.

At first sight Austin's doctrine appears to involve merely an abstract question, or intellectual problem, which has no real bearing on actual government; but this is by no means true, for, although as understood by its author it is harmless, even if erroneous, yet, when applied to politics, it is liable to be very much abused, and to become the source of evils which were by no means contemplated by him. In the first place, the doctrine that sovereign power is unlimited leads almost unavoidably to the opinion that it is proper to use that power without restraint, because the great mass of the people will not distinguish between the legal and moral aspect of politics, and are very sure to conclude that if the State has a legal right to deprive the individual of his property, it is under no moral obligation to refrain from doing so. The people are apt, in the second place, to confound sovereignty with political power, and to attribute the former to any body which exercises legislative authority. If, therefore, they are taught that the sovereign has absolute power, they will believe that the legislature ought to, and in fact does, have authority to pass laws without restraint; a notion which would undermine the very foundations of our whole political system. It is for these reasons that the doctrine advanced by Austin is of real practical importance, and not a mere matter for intellectual speculation. In considering the subject, however, I shall assume the liberty, so rarely allowed at the present day, of treating the theory from a purely abstract stand-point, without inquiring in what body or bodies sovereignty is actually lodged in the United States, or whether those bodies (be they States severally, States in union, or people of the nation) are, in fact, possessed of absolute power or not.

The writers of that great school which maintained the possibility of limitations upon the authority of government, based their theories upon what they styled the natural rights of man. Man, they said, is endowed by nature with certain legal rights which he cannot or at least which he never did surrender, and these rights, derived as they are from a higher source than civil government, cannot be abridged or destroyed by legislation. Such a tenet of man's natural rights was for a long time accepted as an axiom by the great bulk of Englishmen, and it is due to Austin more than to any one else, with the possible exception of Bentham, that within the last half century the idea has been completely discredited, and has been abandoned by almost every scholar in England and America. Austin's teachings on this subject were not, however, altogether original with him, but were derived from Hobbes, whose writings, except when occasionally mentioned with a shudder, slept unnoticed for two hundred years until brought into prominence again by his great disciple. Hobbes seems to have been the first man who understood the difference between legal and moral obligations; who saw that legal rights depend for their existence upon positive law, and that positive law is an artificial creation made by men. In this view he was followed by Austin, who developed the crude notions of his master into a complete philosophical system.

Austin's definition of law may be briefly stated as follows: A law is a command, coupled with a sanction, given by a political superior or sovereign to a political inferior or subject. Now, so far as statute law is concerned this definition is undoubtedly correct, for a statute is clearly a command issued by the legislature, but the customary law presents at once a difficulty, and of this Austin says (Lecture I., p. 23, 2d ed.): —

"Now, when judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom), the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules which he makes derive their legal force from authority given by the State: an authority which the State may confer expressly, but which it commonly imparts by way of acquiescence. For, since the State may reverse the rules which he makes, and yet permits him to enforce them by the power of the political com-

munity, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration.

"Like other significations of desire, a command is express or tacit. If the desire be signified by *words* (written or spoken), the command is express. If the desire be signified by conduct (or by any signs of desire which are *not* words), the command is tacit."

"Now, when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature. The State which is able to abolish, permits its ministers to enforce them: and it, therefore, signifies its pleasure, by that its voluntary acquiescence, 'that they shall serve as a law to the governed.'"

The reasoning here presented rests, it will be noticed, entirely on the statement that the sovereign legislature has power to abolish the customary law; but this assertion, while very nearly accurate in the present state of political development, is by no means universally true. In most of the civilized countries of the world, perhaps in all of them, there exists to-day a legislative body which possesses such a power; but this has not always been the case, for it is well known to students of early forms of law that the legislative function develops much later than the administrative or the judicial, and that law attains a considerable degree of perfection before a distinct idea of legislation makes its appearance. The practice, indeed, of creating law shows itself at first modestly and timidly, and attempting to conceal its real nature, assumes the form of declaring existing rules or regulating the methods of procedure and not that of deliberate innovation. For a long time custom is far more potent as a source of law than legislation, and it is only by very slow degrees that the latter acquires the predominance. A certain class of laws, moreover, those which relate to the fundamental institutions of government, were not drawn completely within the sphere of legislation until very recent times. Louis XIV., for example, was the sole possessor of political power, and, therefore, absolute sovereign in France; but an attempt on his part to make Madame de Maintenon his successor on the throne would undoubtedly not have been considered by the bulk of his subjects as impairing his heir's right to the crown; and although in some countries the royal succession was deliberately altered, yet the power of changing the

constitution of government cannot be said to have developed fully in modern Europe before the outbreak of the French revolution. In the early stages of civilization the power of any man or body of men to interfere with customary law is extremely limited, and the persons by whom justice is administered are not in fact, or in public estimation, the ministers of any legislative body, nor are they under its control. It is only by the purest of fictions, therefore, that customary law under these circumstances can be said to exist by virtue of the will of such a body, or to be established by its commands.

It is clear, therefore, that Austin's definition of law, although nearly accurate at the present day, is incorrect when applied to primitive societies, or even to those which have reached a considerable degree of civilization. The definition, in short, is not true of law in general, and this is important when we come to consider the nature of sovereignty, because Austin's proof that sovereign power can have no limits is based entirely, as we shall see, upon the proposition that all law is the command of a political superior. If, therefore, this proposition is not universally true, his proof, even if otherwise unimpeachable, will apply only to those States in which it can be shown as a fact that all law derives its force from such a command; and in these States, moreover, it will not demonstrate that the power of the sovereign is incapable of limitation, but merely that it is not actually limited at the time when the fact in question is found to exist.

We now come to the great argument designed to prove that sovereign power cannot be limited. It is as follows (Lect. VI., p. 225, 2d ed.): —

"Every positive law, or every law simply and strictly so called, is set, directly or circuitously, by a sovereign person or body, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set, directly or circuitously, by a monarch or sovereign number to a person or persons in a state of subjection to its author."

"Now, it follows from the essential difference of a positive law, and from the nature of sovereignty and independent political society, that the power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of *legal* limitation. A monarch or sovereign number, bound by a legal duty, were subject to a higher or

superior sovereign: that is to say, a monarch or sovereign number, bound by a legal duty, were sovereign and not sovereign. Supreme power limited by positive law is a flat contradiction in terms."

"Nor would a political society escape from legal despotism, although the power of the sovereign were bounded by legal restraints. The power of the superior sovereign immediately imposing the restraints, or the power of some other sovereign superior to that superior, would still be absolutely free from the fetters of positive law. For, unless the imagined restraints were ultimately imposed by a sovereign not in a state of subjection to a higher or superior sovereign, a series of sovereigns ascending to infinity would govern the imagined community, which is impossible and absurd."

This argument depends for its force, as I have said, upon the proposition that all law is the command of a definite political superior, since it is based upon the assumption that legal restraints can be imposed only by means of such a command. Now, let us return for a moment to the passage already quoted from Austin, in which he tries to prove that customary law derives its authority from a command of the sovereign. The argument there used is, shortly, as follows: The sovereign has power to abolish the customary law; by refraining from so doing he declares his pleasure that it shall continue in force; it owes its existence, therefore, to an expression of his will, and may properly be said to result from his command. The whole of this reasoning rests upon the premise that the sovereign has power to abolish the customary law, and the truth of that premise might be demonstrated by either one of two methods. It might, in the first place, be proved inductively; that is, by examining all known systems of law, and showing that in each of them the sovereign had the power claimed for him,—a result which would establish a probability more or less strong that the power in question was universal. Such an examination, however, not only fails to establish the premise in this case, but actually disproves it, because, as has been already pointed out, there are known systems of law in which the sovereign does not possess the power in question. The premise might, on the other hand, be proved deductively, that is, by showing that it followed as a logical conclusion from some other premise or proposition admitted to be sound. Now, the proposition that the power of the sovereign can have no limits

will appear on a little reflection to be the only one available for this purpose, and, inasmuch as Austin makes no attempt to examine all known systems of law, it would seem at first sight that the process of thought in his mind involved a deductive reasoning from that proposition as a premise. If, however, we state the proof that customary law is the command of the sovereign in this form, and compare it with the proof that sovereign power can have no limit, we shall see at once a flaw in the logic. These arguments, taken together, are as follows: The power of the sovereign can have no limits; he has, therefore, power to abolish the customary law; hence, all law is the command of the sovereign; and from this it follows that his power can have no limits. The reasoning in a circle here is only too evident, and it is impossible that a man of Austin's logical acuteness should have been guilty of so palpable an error. The fact is that Austin simply assumed the power of the sovereign to abolish customary law. He did not attempt to prove it deductively, nor did he make an examination of all known systems of law, but his attention having been directed only to highly developed societies, he thought the proposition sufficiently obvious to be accepted without question. It is probable, however, that many of his readers have been misled into supposing the proposition established deductively, and that they have unconsciously gone through in their own minds the reasoning in a circle already described; a mistake which is the more natural because the two arguments are separated in Austin's book by two hundred pages, and one of them might easily be forgotten before the other was reached.

I have so far attacked Austin's demonstration that the power of the sovereign can have no limit by trying to prove his premise that law is a command untrue as a general proposition, and by showing that the process by which that premise is often supposed to be established involves a reasoning in a circle. But these do not exhaust all the possible objections to his position, and for the purpose of discussing his arguments further I shall leave out of sight the criticisms already made, and suppose the proposition that all law is the command of a definite political superior to have been satisfactorily proved. From this it follows that no law can exist except by virtue of such a command; but is it therefore true that every command of a political superior, or of the ultimate superior termed the sovereign, is a law? That is, of course, the point which Austin

seeks to prove; because if there are, or may be, commands of this sort which are not laws, if, in other words, the sovereign is for any reason unable, by issuing a command, to make a law in accordance with his will, then his legislative power is limited by just the extent of that inability. Starting with the proposition which, for the purpose of this part of the discussion, I have admitted, Austin very properly draws the conclusion that a sovereign, being by definition subject to no political superior, cannot be bound by any commands issued by such a superior, and cannot, therefore, be bound by any laws, or be subject to any legal restraints whatever. From this it is clear that no act of the sovereign can be a violation of any legal duty, or give rise to any legal claim against him, or render him liable to punishment, and, in short, that he can do no legal wrong. It is also clear that no law can declare his commands invalid, or deprive them of any legal force they would otherwise possess; but it does not follow that all his acts are valid and effectual, or that all his commands are laws. These are two very different things, and the former by no means implies the latter, but may very well exist without it. The Queen of England, for example, although not a sovereign in the sense in which we are using the word, is in fact free from legal restraint. She can do no legal wrong. She cannot be sued or prosecuted for any act which she may commit. But her commands are not laws, and this is not because her power of legislation is restrained by the orders of a political superior, but simply because she possesses no legislative power at all. Here, then, we have the case of a member of a political society enjoying absolute freedom from legal restraint, without any corresponding authority to make laws.

Let us take another illustration. It was at one time asserted by the English judges that parliament had not unlimited power; that it could not, for example, make a man a judge in his own case. Now, suppose that this doctrine had prevailed, and that both the judges and the community at large had been universally in the habit of disregarding statutes which conflicted with the principle I have mentioned. It is evident that parliament in such a case would possess only a limited power of legislation, and yet would be bound by no legal duties, and subject to no legal restraints. The act of the parliament in passing a statute of this kind would not involve that body or its members in any liability to punishment, and, according to Austin's own definition, its act would not be a breach

of any duty imposed by law, because no sanction is attached in case of disobedience. The conduct of the legislature, in other words, would not be illegal, but simply ineffectual. Parliament, therefore, would be subject to no legal duty, and yet would possess only a limited authority. Austin's argument, however, goes, as I have said, farther than this, and means that if parliament were subject to no superior, the validity of its commands could not in any way be limited by law. Now, the result we have imagined could, of course, be produced by means of a law, set by a political superior, which declared the objectionable statutes invalid; but Austin makes no attempt to prove that it could not also be brought about without the intervention of such a law, and, in the case supposed, it would be clear that neither the judges, nor any definite political superior, issued commands to this effect, and that the statutes were not disregarded, on the ground that they conflicted with any such commands. To assume, indeed, that because the legislative power of the sovereign is not limited by law, it is therefore without limit, is to assume one of the very points to be proved, and a point, moreover, which is far from self-evident. It is like assuming that, because the soil of Great Britain is not bounded by that of any other country, it is unlimited in extent.

It will perhaps occur to some one that if all law is the voluntary command of the sovereign and the expression of his will (a proposition which for the purpose of this part of the discussion I have admitted), then through a change of that will any part of the law may cease to operate, and any right, being but the creature of law, may be taken away. It may seem, in short, that the sovereign, merely by revoking his own commands, can bring about any conceivable variation in that vast network of rights and duties which forms the substance of the law. Such, however, is not the case, because, although it is true that a volition which can be exercised only in one way is no volition at all, and that law cannot be said to exist by the will of the sovereign if he has no real option in the matter, yet it is equally true that the power of willing need not be unlimited in order that an act may be voluntary. It is enough that there exists a choice, although that choice does not extend to an infinite variety of objects. In order, therefore, that the act of the sovereign in making a law should be voluntary, it is only essential that he should have the option of making the law or not, or that he should have a choice between two or more possible

laws. It is not necessary that he should be able to establish any conceivable combination of rights and duties. To maintain the contrary would be like asserting that my motions are not voluntary because I cannot bend my joints the wrong way, or that my house does not stand during my pleasure, because I cannot tear down the lower story and leave the upper ones undisturbed. Hence it is clear that even if all law is based upon the will of the sovereign there may be combinations of rules which he cannot make, and it follows that there may be rights which he cannot take away; at least if we leave out of account his power to revoke all his commands at once, and introduce a general state of anarchy, — an act which would be very nearly equivalent to an abdication.

Up to this point we have been examining Austin's proof that the power of the sovereign can have no limit, and I have tried to show that the argument is based upon an erroneous premise, and that even if the premise were sound the conclusion would not follow. Let us now study his definition of a sovereign, and see what inferences can be drawn from it. "If a *determinate* human superior," he says (Lect. VI., p. 170, 2d ed.), "*not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent." Now, suppose that the members of a society are in the habit of obeying all those commands issued by the sovereign which relate to a certain class of matters, but are at the same time in the habit of disobeying all his commands affecting another class of matters. Suppose, for example, that they are in the habit of obeying all commands relating to secular concerns, while in the habit of disregarding entirely all commands touching religion. In such a case it is absurd to say that there is no government, and that the condition of the society is one of mere anarchy; but it is also impossible to hold that the legislative power of the sovereign is unlimited, because those of his commands which are disregarded by his subjects, and which he has no power to enforce, amount only to ineffectual expressions of desire on his part, and by a misuse of terms alone can be called laws. Sovereignty depends, in fact, upon the habitual obedience of the society, and it is hard to see how it can extend farther than the habit upon which it rests. If, therefore, the society is not in the habit of obeying commands which relate to certain matters,

the sovereignty of the person who issues them does not cover those matters, and the commands in question are not laws. The case we have supposed is extremely unlikely to occur, because a sovereign who found that a certain class of his commands were habitually disobeyed would, in all probability, either desist from issuing them, or attempt to enforce them, and thereby provoke a conflict likely to result in his success or his overthrow. Let us, however, take a less improbable case. Let us suppose that the commands of a sovereign which concern one class of affairs are habitually obeyed, but that he refrains from issuing any commands touching another class of affairs because he knows that they would certainly be disobeyed. This case is evidently parallel to the last one, for, so long as the habit of obedience does not extend to commands dealing with certain matters, it can make no difference whether such commands are issued and disobeyed, or whether they are not issued for fear of disobedience. It would seem, therefore, that the limit of sovereign power depends upon the limit of habitual obedience; that every command of a political superior, or (if we reject the proposition that all laws are commands) every rule of conduct, which is obeyed by the bulk of a given society, is a law, provided, of course, it is coupled with a sanction appropriate to law in the state of civilization which that society has reached; and that, conversely, no command or rule of conduct is a law if it does not receive the obedience of the bulk of the society.¹

This test can readily be applied to existing enactments, but it is not always easy to prophesy whether a command of a new and unprecedented character would be obeyed or not. Inasmuch, however, as the bulk of every society, except in cases of severe social convulsion, is, from one motive or another, in the habit of obeying what it regards as the law, and is not in the habit of obeying rules which it does not consider law unless they are agreeable, it is sufficiently accurate to say that if the bulk of a society consider that a certain command, if issued by the sovereign, would not be a law, and if they are not disposed to obey it, then such a command would not be a law, and does not lie within the legislative power of the sovereign. The extent, in other words, of sov-

¹ It may be supposed that, according to this principle, the statutes forbidding the use of liquor in some States are not laws, but that would be going too far, because these acts are by no means disregarded. Persons violating them may perhaps be rarely prosecuted, but the law is strictly enforced by the courts whenever a case is brought before them.

ereign power is measured by the habit, the opinion, and the disposition of the bulk of the society.

Bentham appears to have held this view of the limitation of sovereignty, although, from some expressions which come after the passage here quoted, it is doubtful whether he distinguished clearly the position of the sovereign from that of a subordinate legislative body. The following extract is from the *Fragment on Government*, Chapter IV.:—

“XXXIV. Let us now go back a little. In denying the existence of any assignable bounds to the supreme power, I added ‘unless where limited by express convention:’ for this exception I could not but subjoin. One author (*Blackstone*), indeed, in that passage in which, short as it is, he is most explicit, leaves, as we may observe, no room for it. ‘However they began,’ says he (speaking of the several forms of government)—‘however they began, and by what right soever they subsist, there is and must be in ALL of them an authority that is absolute. . . .’ To say this, however, of *all* governments without exception;—to say that *no* assemblage of men can subsist in a state of government, without being subject to some *one* body whose authority stands unlimited so much as by convention;—to say, in short, that not even by convention can any limitation be made to the power of that body in a State which in other respects is supreme, would be saying, I take it, rather too much: it would be saying that there is no such thing as government in the German Empire; nor in the Dutch Provinces; nor in the Swiss Cantons; nor was of old in the Achæan league.”

“XXXV. In this mode of limitation I see not what there is that need surprise us. By what is it that any degree of *power* (meaning *political power*) is established? It is neither more nor less, as we have already had occasion to observe, than a habit of, and disposition to obedience: *habit*, speaking with respect to past acts; *disposition*, with respect to *future*. This disposition it is as easy, or I am much mistaken, to conceive as being absent with regard to one sort of acts, as present with regard to another. For a body, then, which is in other respects supreme, to be conceived as being with respect to a certain sort of acts limited, all that is necessary is, that this sort of acts be in its description distinguishable from every other.”

“XXXVI. By means of a convention, then, we are furnished

with that common signal which, in other cases, we despaired of finding. A certain act is in the instrument of convention specified, with respect to which the government is therein precluded from issuing a law to a certain effect: whether to the effect of commanding the act, of permitting it, or of forbidding it. A law is issued to that effect notwithstanding. The issuing, then, of such a law (the sense of it, and likewise the sense of that part of the convention which provides against it being supposed clear) is a fact notorious and visible to all: in the issuing, then, of such a law, we have a fact which is *capable* of being taken for that common signal we have been speaking of. These bounds the supreme body in question has marked out to its authority: of such a demarcation, then, what is the effect? Either none at all, or this: that the disposition to obedience confines itself within these bounds. Beyond them the disposition is stopped from extending: beyond them the subject is no more prepared to obey the governing body of his own state than that of any other. What difficulty, I say, there should be in conceiving a state of things to subsist in which the supreme authority is thus limited,—what greater difficulty in conceiving it with this limitation, than without any, I cannot see. The two states are, I must confess, to me alike conceivable: whether alike expedient,—alike conducive to the happiness of the people, is another question."

It is worth while to notice here a difficulty which Austin encounters when he tries to explain the position of a person who is, at the same time, sovereign in one independent political society and subject in another. "Supposing, for example," he says (Lect. VI., p. 216, 2d ed.), "that our own king were monarch and autocrat in Hanover, how would his subjection to the sovereign body of king, lords, and commons, consist with his sovereignty in his German kingdom? A limb or member of a sovereign body would seem to be shorn, by its habitual obedience to the body, of the habitual independence which must needs belong to it as sovereign in a foreign community. To explain the difficulty, we must assume that the characters of sovereign, and member of the sovereign body, are practically distinct: that, as monarch (for instance) of the foreign community, a member of the sovereign body neither habitually obeys it, nor is habitually obeyed by it." Now, a sovereign possessed of strictly unlimited power can issue to his subject any commands he may please, and inflict punish-

ment in case of disobedience. The sovereign of England, for example, may command his subject, the sovereign of Hanover, under pain of death, to collect taxes in his German dominions, and remit them to England. In his attempt to avoid this conclusion Austin concedes the very point at issue, and seems virtually to adopt the theory of sovereignty which has been suggested in the preceding pages; for, by distinguishing between the acts which the king of Hanover performs as subject of England, and those which he performs as sovereign of a foreign country, and saying that the legislative power of England covers only the former, he admits that the British sovereign may have power to issue commands which relate to one class of acts, and at the same time may not have power to issue commands which relate to another. This is nothing less than an admission that the power of the sovereign is not always unlimited. He declares, moreover, that the question whether the legislative power of England extends to the acts of its subject performed as sovereign of Hanover is determined by the habitual obedience of the subject in that capacity. He considers, therefore, that, in this case at least, the extent of the sovereign's power is measured by the habitual obedience of the subject. The same or a similar difficulty is involved in Austin's statement (*Lect. VI.*, p. 323, 2d ed.), that a person may be at the same time completely a member of one independent political society, and for certain limited purposes a member of another; but he makes no attempt to solve it.

If the extent of sovereign power is measured by the disposition to obedience on the part of the bulk of the society, it may be said that the power of no sovereign can be strictly unlimited, because commands can be imagined which no society would be disposed to obey. This may very well be true, and perhaps it would be proper to classify sovereigns, not according as their authority is absolute or not, but according as it is indefinite, or restrained within bounds more or less definitely fixed. Unless, indeed, the limits of power are tolerably well determined they tend to stretch farther and farther. Now, definite limits may be set to sovereign power in either one of two ways. They may result from the rivalry of two independent rulers, which settle by negotiation questions concerning the boundaries of their respective jurisdictions, and quarrel when they cannot agree; or they may be established by some formal declaration, which by sufficient precision enables the bulk of the society to have a general opinion about the extent of leg-

islative authority, and to distinguish between those commands which fall within the boundaries prescribed and those which do not.

Let us consider the first of these cases. If the sovereign's power to make laws can be limited to a certain class of affairs, it is clear that other matters not within these limits may form the sphere of action of another sovereign, and thus two sovereigns may issue commands to the same subjects, each being supreme in his own department. It may not, perhaps, be always easy in such cases to define accurately the boundaries of each ruler's authority; but this difficulty, which arises from the impossibility of an exact classification of all human actions, is constantly met with in applying the law, and does not affect the proposition that two sovereigns with different spheres of activity may govern the same subjects. The relation of the Church to the various temporal rulers in Europe during the Middle Ages was, indeed, of the character here described.

The possibility of what I may call a dual sovereignty in one political society suggests an inquiry into the connection between the terms "sovereign" and "nation." The former is the name given to an independent political superior, considered in relation to his subjects. The latter is applied to the society composed of the superior and the subjects, considered in relation to other independent political societies. Now, it is often assumed that these two conceptions are inseparable; that every nation must have one and only one sovereign, and that every sovereign, together with his subjects, must constitute a nation; but I think that this is a mistake, because, if, as I have urged, there can exist within the same territory two sovereigns, issuing commands to the same subjects touching different matters, it may very well happen that one of them has no relations with other independent political societies. It may happen, for example, that the authority of a sovereign, in respect to the matters within his competence, extends over several communities, each of which is subject in other matters to an independent political superior of its own, while all the relations with foreign powers fall within the competence of the central government, and in this case the lesser political bodies, although strictly sovereign, could not properly be called nations. I do not assert that this is true of the United States, but merely that there is nothing illogical or impossible in such a state of things. The proposition in fact, that a nation can have only one sovereign, and

that every sovereign together with his subjects must constitute a nation, depends upon the hypothesis that the authority of a sovereign is necessarily unlimited, and with that hypothesis it must stand or fall.

The second method in which the limits of sovereign power may be definitely fixed is, by means of a declaration, sufficiently precise to enable the members of the society to distinguish between those commands which fall within the authority of the sovereign and those which do not. Such a declaration can be made in various ways, and, in order that it may have the effect proposed, it is only necessary that the bulk of the community should consider all commands issued in excess of the authority set forth invalid, and should not be disposed to obey them. It can be made, for example, by means of a convention or compact as Bentham suggests, or without any compact by the sovereign himself, by an assembly of citizens when changing the form of government, or by several independent communities when uniting to create a new nation. It is, in fact, conceivable that it might be made without any written instrument at all, by a process of gradual evolution, although such a state of things is not very likely to occur, and probably would not be permanent. Provided, however, the result I have described is reached, the method of attaining it is quite immaterial.

Several different theories about the political institutions of the United States have been put forward from time to time, but I shall refer to them only for the sake of suggesting the bearing which the foregoing discussion may have upon them. If Austin's doctrines concerning the nature of sovereignty and of law be accepted, only two views of the government of this country can be entertained. Of these, one has been rendered famous by the advocates of extreme States' rights, who considered the State completely sovereign, and maintained that without its own consent (a consent revocable, moreover, at any time), neither the State nor its citizens could be bound by any command of the central government. The other is the extreme national theory, which treats the authority of the States as entirely dependent upon the pleasure of the national sovereign; meaning, of course, by this term, not Congress, but the States in union, the American people, or whoever else the sovereign of the nation may be. Now, if the first of these views is adopted the Constitution must be looked upon as a

treaty revocable by any party thereto; if the second, it is a command issued by the national sovereign, which can be changed at will by him; but if, on the other hand, we reject Austin's theory, we are at liberty to consider the Constitution neither a treaty nor a command, nor even a law at all, but a declaration of the limitations of various sovereign powers, which cannot legally be changed except in the manner provided in the instrument itself. The recent discussion in Rhode Island, of the question whether the Constitution of a State can legally be amended, except in the manner prescribed therein, turns in part upon the same principles, because, if Austin's theory is sound, the Constitution is a law set by the sovereign, who is, in the case we are considering, the electoral body of the State; and it follows that this body must have power to revoke or alter its own commands. But, if Austin's theory is wrong, it is possible that there may exist in the State no legislative or sovereign power whatever, except such as is described in the Constitution, and, if so, neither the voters nor any other body of persons can have any legal authority to make changes in the government, except in accordance with the provisions of that instrument.

It may be worth while, in this connection, to remark that, whether, like Austin, we consider a constitution a law set by an absolute sovereign, or whether we regard it as a law made without the command of a political superior, or even as no law at all, but simply as a declaration of the existing limits of sovereign power, the effect of an unconstitutional statute is in each case the same, because, if the Constitution, whatever its origin, is a law of superior authority, every inferior law inconsistent with it must be void; and if, on the other hand, without being a law it is the measure of legislative power, a statute which exceeds the limits prescribed is destitute of legal authority, and is equally invalid. On this point, indeed, and in regard to the functions of courts in dealing with such laws, all these theories are exactly in accord.

In attacking the doctrines concerning sovereignty and law taught by the analytical jurists, I have in reality only been trying to carry out their own principles. Before their day it was customary to seek a foundation for sovereignty in some antecedent right to rule, such as a divine commission or an original compact, and the great change in the theory of government which Bentham and Austin introduced consisted in their assertion that sovereignty was not a question of right, but of fact; that the sovereign was not the person

who had a right to rule, but the person who did, in fact, receive obedience. Now, the argument in the foregoing pages is an attempt to extend this principle, and to show that the existence of any law is a question of fact. A command or rule of conduct, according to this view, becomes a law, not because it ought to be such, or because it proceeds from a person in other respects sovereign, but only in case it is really obeyed; and in the same way the extent of sovereign power being, like the very existence of sovereignty, a pure matter of fact, depends entirely upon the extent of the obedience actually rendered.

A. Lawrence Lowell.

BOSTON.

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10 TREMONT STREET, BOSTON, April 2, 1888.

To the Editors of the HARVARD LAW REVIEW, Cambridge, Mass. :—

GENTLEMEN, — Mr. Justice John Lathrop of the Superior Court of Massachusetts recently discovered in a collection of old papers in his office in the Court House, in this city, some valuable and interesting documents and letters relating to the organization of a Harvard Law School Association in the year 1868, which he has very kindly placed in my hands to be preserved with the papers and records of the present Harvard Law School Association.

Among these papers is a printed circular containing an account of the formation of the Association of 1868, to which are appended the autograph signatures of two hundred and seventeen former members and students of the Harvard Law School, who subscribed to the constitution and united to form the Association.

Believing that this document will prove of great interest, not only to the survivors of the group of former members of the Law School who united to form this first Association of its Alumni, but also to all Harvard Law School men now living who are members of, or interested in, the present Harvard Law School Association, I send you a copy of the circular, and of the list of the original two hundred and seventeen subscribers, with the request and suggestion that they be printed in the pages of the HARVARD LAW REVIEW.

The organization of the Association of 1868 was followed in the next year by a reunion of its members at a dinner at the Parker House, Boston, June 24, 1869, which was numerously attended. Among the distinguished guests present on that occasion who responded to toasts were : Hon. E. R. Hoar, Attorney-General of the United States ; Mr. Justice Horace Gray of the Supreme Court of Massachusetts ; Professor Theophilus Parsons of the Harvard Law School ; Chief Justice Charles L. Bradley of the Supreme Court of Rhode Island ; Mr. Justice Storer of Ohio ; Mr. Justice Charles Devens of the Supreme Court of Massachusetts ; Mr. Justice John Wells of the Supreme Court of Massachusetts ; Professor James Russell Lowell.

How soon thereafter the Harvard Law School Association of 1868 ceased altogether to meet for any purpose, either of business or

pleasure, and passed into history, I am unable to say, for none of the documents that have come recently into my possession relate to any proceedings, or tell the history, of the Association, subsequent to the dinner of June 24, 1869, and I am at present without other sources of information.

Very truly yours,

WINTHROP H. WADE,

Treasurer H. L. S. Ass'n.

HARVARD LAW ASSOCIATION.

DANE LAW SCHOOL, CAMBRIDGE, MASS.

A meeting of the Students and Resident Graduates of the DANE LAW SCHOOL was held in the Library Room of Dane Hall, on the evening of the twenty-second of June, for the purpose of proposing a plan for the organization of an Association of the past and present members of the School. At this meeting a committee was appointed to make arrangements for a second meeting, and to prepare an address to the older members of the School, inviting their attendance at, and co-operation in, the proceedings of the subsequent meeting.

Agreeably to such instruction, the following circular was prepared and issued by the committee : —

CAMBRIDGE, June 25, 1868.

SIR, — The many pleasant, personal, and local associations which ordinarily grow out of the assembling together of young men, for the purposes of education and general culture, have often suggested to the members of the Law School of Harvard University a desire to adopt some means of keeping alive an interest in each other's fortunes and success in life, and in preserving those relations of personal regard, which time and a separation from each other can hardly fail to dim, if not to obliterate.

Encouraged by opinions expressed by past members of the School, the present members thereof, in order to devise a plan for a more permanent union of influence and interest, convened at Dane Hall on the evening of the twenty-second inst., to consult upon the best means of accomplishing this purpose. A committee was raised to consult with former members of the School and ask their co-operation, and to address to such of them as they could reasonably expect to be present, a circular inviting them to attend a meeting at an early day, for the purpose of forming an Association similar to the Alumni Associations of the New England Colleges, of such as have been members of the Harvard Law School, to come together at stated periods, and to strengthen and extend a liberal and generous sympathy among those who have been educated to the same noble science, and have shared the instruction and honors of a common *Alma Mater*.

This circular letter, subscribed by past as well as present members of the School, has accordingly been prepared, and is now forwarded to you, requesting you to meet at Dane Hall, on Thursday, July 9th, 1868, at 7½ o'clock P.M., to confer and take measures to organize such an Association. If unable to attend, please communicate your views and wishes in the premises, by letter, to be read at the meeting, addressed to GEORGE H. BATES, Cambridge, Mass.

The undersigned would venture further to suggest, in favor of such an Association, that, if organized and sustained upon the broad and generous principle of cultivating a mutual respect and regard among the members of a profession so widely extended, and embracing within its scope so many subjects of important and interesting investigation, it can hardly fail to be of great value as an instrumentality for good, beyond its bearing upon the personal relations of its members. It can be made the medium of a sound public sentiment upon matters outside of the immediate precincts of professional duty, and will go far towards creating and strengthening that relation which ought to subsist between educated men, and supplying a principle of national life and unity to the active thought of the country.

Yours truly,

GEORGE S. HILLARD,
EMORY WASHBURN,
BENJ. R. CURTIS,
CHAS. THEO. RUSSELL,
THOS. RUSSELL,
E. P. BROWN,
J. Q. A. BRACKETT,
WM. H. WINTERS,

Of the Alumni.

HORACE R. CHENEY,
GEORGE H. BATES,
THOS. MCC. BABSON,
JOHN J. MCCOOK,
Of the School.

The second meeting was held in Dane Hall, on Thursday evening, July 9th, and was organized on motion of HON. GEO. S. HILLARD, by the appointment of Ex-Gov. WASHBURN as Chairman. PROF. WASHBURN, on taking the chair, made a statement of the objects of the meetings, and expressed himself as heartily in favor of the establishment of an Association of the character proposed, believing that the existence of such an organization would advantageously affect the prosperity and influence of the School; that it would be a bond of sympathy and union between the members of the profession in all parts of the Union, who have enjoyed the advantages of a legal education at Cambridge, and would assist in securing the success of those important principles and objects to which the attention of the Alumni had been called in the above circular. On motion, MR. W. H. WINTERS was appointed Secretary. HON. CHAS. THEO. RUSSELL moved that the meeting proceed to the organization of an Association of the School as proposed. The motion was carried.

On motion of HON. RICHARD H. DANA, JR., it was voted that a committee of five be appointed to draft a Constitution. The Chair appointed as members of said committee, Messrs. DANA, LATHROP, WRIGHT, BRACKETT, and BABSON.

During the absence of the committee, MR. G. H. BATES, of Delaware, read letters in response to the circular from JUDGE GEO. HOADLEY, Cincinnati; GEN. GEO. F. SHEPLEY, Portland; HON. ELIHU B. WASHBURN, Washington, D.C.; HON. WM. PINCKNEY WHITE, Baltimore; GOV. R. B. HAYES, Ohio; JUDGE NATHANIEL HOLMES, St. Louis; HON. A. G. MAGRATH, Charleston, S.C.; HON. CHAS. PEABODY, New York; JUDGE DEVENS, Worcester; JUDGE MARCUS MORTON; HON. JOHN C. CHURCHILL, Washington, D.C.; PROF. THEO. PARSONS, and others.

Brief and interesting addresses were also made by HON. GEO. S. HILLARD (Class of 1832), JAMES RUSSELL LOWELL (Class of 1841), HON. RICHARD H. DANA, JR., and by other gentlemen.

The Committee on the Constitution, through their Chairman, Mr. Dana, made their report.

The Constitution as adopted is hereinafter recited.

Upon the adoption of the Constitution, a committee on permanent organization, composed of Messrs. RUSSELL, LOWELL, THOMAS, CLIFFORD, and BATES, were appointed. The report of the committee was accepted, and the following members were selected as the officers of the Association for the first term:—

President,	Hon. BENJAMIN R. CURTIS, Massachusetts.
Vice-Presidents,	“ CHARLES BRADLEY, Rhode Island.
	“ WM. M. EVARTS, New York.
	“ A. S. MAGRATH, South Carolina.
	“ GEORGE HODLEY, Ohio.
	“ OGDEN HOFFMAN, California.
Recording Secretary,	JOHN LATHROP, Esq., Boston.
Corresponding Secretary,	C. C. READ, “ “
Treasurer,	WM. I. BOWDITCH, “ “
Executive Committee,	Hon. RICHARD H. DANA, JR.
	“ GEORGE S. HILLARD.
	HENRY W. MUZZEY, Esq.
	FRANK GOODWIN, “
	JOHN F. SMITH, “

The following resolution was unanimously adopted:—

Resolved, That the members of the Association are earnestly recommended to form auxiliary local clubs in the States and principal cities of the Union, to assist in promoting the objects set forth in the preamble to the Constitution.

On motion, the meeting then adjourned.

Gentlemen who have been connected with the Law School, either as professors or students, are invited to subscribe their names to the following, the Constitution.

CONSTITUTION OF THE HARVARD LAW ASSOCIATION.

Preamble.

The past and present members of the Dane Law School of Harvard University unite to form “The Harvard Law Association,” having in view, among others, the following objects: To maintain and advance the character of the Dane Law School,—to promote its general welfare, to revive the pleasing memories of common legal studies, to secure the highest moral and intellectual standards for the legal profession, and to purify it from sectional and all other narrowing influences; also by cultivating a mutual respect and an agreeable social intercourse among its members, to become the medium of a sound public sentiment upon matters outside of the strict limits of professional duty, and to create and strengthen those relations which ought to subsist between educated men whose position gives them influence over the life and thought of the country.

Art. I. OF MEMBERS.

All who have been connected with the Law School, either as professors or students, shall be of right members of the Association.

Art. II. OF OFFICERS.

SECTION 1. The *Officers* of the Association shall be a President, five Vice-Presidents, a Recording Secretary, a Corresponding Secretary, a Treasurer, and an Executive Committee; all of whom shall be elected at regular meetings of the Association, to serve for the term of two years.

SECT. 2. The *President* shall preside at all meetings, and perform all the other duties usually incident to that office.

SECT. 3. The *Vice-Presidents* in the order of seniority shall, in the absence of the President, perform his duties.

They shall be elected one from each of the *New England, Middle, Southern, Western, and Pacific* divisions of States.

SECT. 4. The *Recording Secretary* shall have charge of all records of the Association, shall make and keep accurate minutes of all meetings, shall prepare and preserve, as accurately as may be, a record of all members of the Association, with the year in which they left the School, their residence, the public positions which they may have held, and any other matters of interest concerning them. He may in his discretion appoint in any State an Assistant Secretary, whose duty it shall be to collect and forward to him any statistics in regard to the members of the Association in that section of the country.

SECT. 5. The *Corresponding Secretary* shall conduct the correspondence of the Association.

SECT. 6. The Executive Committee shall consist of five members, by election, residing in Massachusetts, and the Secretary and Treasurer, *ex-officiis*.

Art. III. MEETINGS.

There shall be a meeting of the Association every year, at such time as the Executive Committee shall appoint, who shall also have authority to call special meetings, with such notice as they shall deem sufficient.

Art. IV. AMENDMENTS.

This Constitution may be amended at any of the regular meetings of the Association by a vote of two-thirds of those present.

B. R. Curtis,
Emory Washburn,
Theophilus Parsons,
Nathaniel Holmes,
Darwin E. Ware,
Geo. Griggs,
John C. Ropes,
Edwin H. Abbot,
George M. Reed,
J. M. F. Howard,
F. C. Loring,
Saml. Batchelder, jr.,
Thornton K. Lothrop,

K. B. Kendall,
H. A. Scudder,
Rich. H. Dana, jr.,
G. S. Hillard,
John Lathrop,
Austin J. Coolidge,
G. H. Richards,
Jas. Hewins,
Fisher Ames,
R. R. Bishop,
Arthur Lincoln,
George S. Frost,
James J. Wright, C. '61,

Edward Bangs,
Thos. P. Proctor,
George E. Otis,
Philip H. Sears,
Joseph F. Clark,
R. F. Fuller,
Edw'd D. Boit, jr.,
S. Lothrop Thorndike,
John C. Gray, jr.,
Samuel C. Davis, jr.,
John Codman,
Geo. A. Fisher,
Robert D. Smith,

Henry H. Sprague,
Wm. W. Warren,
Leonard A. Jones,
George Abbot James,
Charles E. Stratton, jr.,
Samuel S. Shaw,
C. W. Loring,
Samuel Snow,
Theodore H. Tyndale,
Benj. F. Thomas,
A. K. P. Joy,
Sam. W. Bates,
S. E. Sewall,
Charles F. Choate,
Richard Olney,
Thomas Weston, jr.,
W. R. P. Washburn,
W. W. Swan,
H. Farnum Smith,
J. Q. A. Brackett,
Wm. A. Munroe,
George M. Hobbs,
William Henry Towne,
Isaac Hull Wright,
George B. Bigelow,
Abbe C. Clark,
William Blaikie,
Frank W. Bigelow,
S. H. Wentworth,
Horace R. Cheney,
C. M. Ellis,
Augustine Jones,
Charles J. McIntire,
Albert B. Otis,
C. Demond,
Saml. Jennison,
Ambrose Wellington,
Selwin Z. Bowman,
W. P. Walley,
George F. Piper,
Moorfield Storey,
Henry Hyde Smith,
Thomas F. Maquire,
M. E. Ingalls,
F. W. Jacobs,
Lemuel Shaw,
John G. King,
Gardiner G. Hubbard,
Chas. Theo. Russell,
C. C. Reed,
A. C. Buzell,
Thomas H. Russell,
William E. Perkins,
D. J. Collins,
George P. Sanger,
Isaac S. Morse,
Hales W. Suter,
N. B. Bryant,
Hiram Wellington,
Fras. A. Brooks,

Benj. F. Brooks,
Henry M. Rogers,
Gerard C. Tobey,
A. J. C. Sowdon,
Woodward Emery,
John P. Treadwell,
Alex. Young,
John T. Wilson,
M. A. Blaisdell,
H. J. Stevens,
Nathan Morse,
E. Augustus Alger,
James F. Farley,
Jabez S. Holmes,
Oliver Stevens,
Charles F. Donnelly,
Phineas Ayer,
Chas. F. Dunbar,
Chas. Eustis Hubbard,
Charles G. Keyes,
W. W. Blackmar,
A. B. Almon,
I. D. Van Duzee,
John H. Ellis,
J. Lewis Stackpole,
Jon. F. Barrett,
J. E. Bates,
Geo. W. Tuxbury,
Geo. Z. Adams,
William B. Durant,*
Geo. Wm. Estabrook,
Uriel H. Crocker,
Edwin Wright,
Geo. L. Roberts,
O. B. Mowry,
T. L. Sturtevant,
J. Brown Lord,
Henry L. Hallett,
Frank W. Hackett,
Wm. A. Herrick,
E. L. Motte,
Frank W. Kittredge,
Wm. J. Forsalith,
George G. Crocker,
J. H. Bradley,
Joseph Willard,
A. W. Lamson,
C. G. Thomas,
William G. Colburn,
Jas. B. F. Thomas,
George W. Ware, jr.,
Warren Tilton,
Henry C. Hutchins,
J. Wingate Thornton,
John Noble,
E. P. Brown,
A. S. Wheeler,
Chas. Wheeler,
Ivers J. Austin,
Charles Allen,

William W. Carruth,
Charles F. Walcott,
Aaron E. Warner,
John W. Titus,
Wm. C. Williamson,
Alonzo B. Wentworth,
John W. Hudson,
Geo. H. Gordon,
R. M. Morse, jr.,
Richard Stone, jr.,
C. W. Huntington,
B. W. Harris,
Chas. R. Train,
Max Fischacher,
Henry W. Muzzey,
A. Kingsbury,
Jos. M. Churchill,
Alfred Hemenway,
Chas. W. Storey,
Payson E. Tucker,
John O. Teele,
S. Arthur Bent,
Wm. I. Bowditch,
Horace G. Hutchins,
N. S. J. Green,
George Bancroft,
H. H. Coolidge,
William A. Hayes, jr.,
John A. Loring,
Maurice Goddard,
John L. Eldridge,
Charles E. Powers,
John C. Park,
C. H. Hudson,
Francis Bartlett,
John L. Thorndike,
Linus M. Child,
Asa French,
George White,
William A. Richardson,
L. B. Thompson,
Wm. P. Harding,
J. W. Hammond,
Francis W. Palfrey,
James J. Storrow,
S. Bartlett, jr.,
David Thaxter,
Saml. F. McCleary,
Charles P. Curtis,
Robert Codman,
E. P. Nettleton,
M. F. Dickinson, junr.,
F. W. Pelton,
Joel Giles,
Geo. R. Hastings,
Thos. Wm. Clarke,
Alonzo V. Lynde,
Curtis Abbott.

THE LAW SCHOOL.

LECTURE NOTES.

EVIDENCE — ADMISSIBILITY OF DECLARATIONS OF TESTATOR TO PROVE CONTENTS OF LOST WILL. — (*From Prof. Thayer's Lectures.*) — Stephen's proposition in his Digest is this: "The declarations of a deceased testator as to his testamentary intentions and as to the contents of his will are deemed to be relevant, when his will has been lost and when there is a question as to what were its contents. . . . In all these cases it is immaterial whether the declarations were made before or after the making or loss of the will.¹ This is very questionable.

The case cited to support the proposition is *Sugden v. Lord St. Leonards*.² In this case the will had disappeared, and its contents were proved by the direct testimony of one witness who was well acquainted with them. That was the main evidence in the case. The judges repeatedly declared, that it did not need corroboration, but that it was satisfactory to find corroboration, and for that secondary purpose declarations of the testator made both before and after the making of the will were admitted. On appeal the admission of this evidence was sustained.

This is all that the case decided, but it is remarkable for many ill-considered *dicta* as to the hearsay exceptions, and as to the rules of evidence in general. See especially the opinions of Jessel, James, and Cockburn. Mellish, L. J., states the sounder doctrine, and his decision is consistent with the authorities.

The doctrine put forward by some of the judges that if evidence is admitted for one purpose, it may be used for any other, is not to be accepted; and the remarks of the Master of the Rolls as to the hearsay rule are peculiarly loose and inaccurate.

Sugden v. St. Leonards is cited with approval in a late Massachusetts case.³ But in *Woodward v. Goulstone*,⁴ in the House of Lords in 1886, the gravest doubt is thrown on the main propositions of the case, and the view taken by Mellish, L. J., is favored.

In the case of *Quick v. Quick*,⁵ which *Sugden v. St. Leonards* disapproves, declarations of the testator, made after the execution of the will, were offered, not as corroborative proof, but as the only evidence of the contents of the will, and it was held that they were not admissible. The questions raised in the two cases were not necessarily the same.

LEASE — TENANT'S RELIEF IN EQUITY FOR BREACH OF CONDITION. — (*From Prof. Gray's Lectures.*) — When the landlord has expressly sanctioned the breach of condition, or knowing of it has waived performance by accepting rent, he is not allowed, even at law, to turn the tenant out.

In certain cases equity will afford protection where courts of law will not.

¹ Art. 29.

³ *Pickens v. Davis*, 134 Mass. 252.

⁵ 3 Sw. & Tr. 442.

² L. R. 1 P. D. 154.

⁴ L. R. 11 App. C. 469.

If, for instance, there has been delay in the payment of rent or taxes, and the tenant pays in full with interest or tenders payment after the ejectment suit is brought, equity will protect him against the landlord. (*Giles v. Austin*, 62 N. Y. 486). On the other hand, it has been decided that for breach of covenant to keep the premises insured equity can afford no relief. (*Green v. Bridges*, 4 Sim. 96).¹ Where the covenant is to repair, the law is not very well settled. In *Bracebridge v. Buckley*, 2 Price, 200, it was held (with a dissenting opinion) that under the circumstances of that case equity could not interfere.

The principle underlying these decisions seems to be, not that a breach has occurred and the landlord has not been injured, nor that damages have been given, but that the contract has in fact never been broken. In other words, where the parties can be restored to the position they held at the time of the breach, equity will eliminate the element of time. Now, in case of a covenant to keep the premises insured, it is plain that equity cannot relieve. Nothing can put the parties in the position they occupied before the breach. The risk has been incurred, and no subsequent insurance could guard against a prior risk. This is equally true when the lessee having covenanted to insure the premises in the lessor's name insures them in his own, — even when this occurs through no fault of the lessee, but by the unauthorized act of his agent. (*Green v. Bridges*, *supra*.)

The covenant to repair stands on a peculiar footing. It is evident, on the one hand, that in every case all possible claims could not be satisfied by a distinct payment of money, and yet, very often, if the premises are repaired they are put in exactly the same condition, or even better condition, than if the repairs had been made at the proper time. The general rule of equity does not seem, however, to allow relief in this case. The covenant was for the doing of a certain thing; that thing has not been done, and equity cannot superintend the performance of it. Where the breach of condition consists in the non-payment of money the parties can, by the very decree of the court, be put in the same position as at the time of the breach.

So where the making of a settlement was a condition annexed to a legacy, and the settlement was not made within the specified time, although through no fault of the legatee, it was held that equity could not interfere. (*In re Hodges' Legacy*, L. R. 16 Eq. 92.)

There exists a special ground for the interference of equity whenever the tenant has been led by the acts of his landlord to believe that a condition would not be strictly enforced. When the tenant has been accustomed to pay his rent on the tenth of the month, though due on the first, the landlord cannot, without warning, demand the rent on the first, and turn the tenant out for not complying. This is called the relief of Equity against *surprises*.

¹ But see *contra*, *Mactier v. Osborne*, 15 N. E. Rep. 641 (Mass.).

RECENT CASES.

AUTHORITY OF TEACHER—CORPORAL PUNISHMENT.—In a criminal prosecution against a teacher for assault and battery in chastising a pupil it was *held*, that within the limits of his jurisdiction and responsibility a teacher may punish a pupil, not cruelly or excessively, but in proportion to the gravity of the offence, and within the bounds of moderation, and in a kind and reasonable spirit. There is a presumption that the teacher properly punished the pupil, and the burden is on the latter to show the contrary.—*Varvactor v. State*, 15 N. E. Rep. 341 (Ind.).

BANKS AND BANKING—INSOLVENCY—DISCOUNTS AND COLLECTIONS—TRUST FUND.—A New York bank was accustomed to discount notes for a Houston bank, and on maturity forward them to the Houston bank for collection and returns, with an understanding that the proceeds of such discounted notes should be preserved by the Houston bank as the property of the New York bank, and be returned to it as such. Such notes, amounting to \$5,000 having been collected by the Houston Bank, the proceeds were credited to the New York bank, and then mingled with its own funds. On the subsequent insolvency of the Houston bank, *held*, that the New York bank was entitled to payment of this amount in priority to other creditors. The understanding between the banks prevented the ordinary relation of debtor and creditor from existing between them after the collection, and gave the proceeds the character of a trust fund, which was not divested by being mingled with the other moneys of the collecting bank. If "throughout all the trustee's dealings with the funds so mingled together, he keeps on hand a sufficient sum to cover the amount of the trust money, . . . the trust should attach to the balance that is found to remain in his hands." *Continental Nat. Bank of N. Y. v. Weems*, 6 S. W. Rep. 802 (Tex.).

COMMON CARRIER—LIMITATION OF LIABILITY.—Action against an Express Co. for negligently delaying shipment of goods. The written contract for shipment contained a clause that "the said Pacific Express Co. shall not be held liable for any claim of whatsoever nature arising from this contract, unless such claim shall be presented in writing within sixty days from the date hereof." The claim was not presented within the time required. *Held*, that the plaintiff's right of recovery for delay in shipment was not barred by the clause in question. Limitations put by a common carrier upon its liability are valid only when reasonable. This limitation is unreasonable. *Pacific Exp. Co. v. Darnell*, 6 S. W. Rep. 765 (Tex.). A note collects cases.

COMMON CARRIERS—TRANSPORTATION COMPANIES—LIMITATION OF LIABILITY.—The plaintiff delivered goods for shipment to the Merchants' Despatch Transportation Company, under a bill of lading which reserved to the company the right to select the particular line of railroads over which the goods should be sent, and stipulated that in case of loss the railroad in whose actual custody the goods should be at the time of the loss, should alone be liable therefor. *Held*, that this stipulation did not relieve the company from liability for loss of the goods. The right of selection of lines reserved to the company made the railroads its agents, and the company, being a common carrier, could not lawfully contract against the consequences of the negligence of its agents. Adjudged cases have already applied this principle to express companies. The doctrine does not depend upon the fact that the messengers of express companies accompany the freight, but is equally applicable to the case of despatch companies. *Block v. Merchants' Despatch Transp. Co.*, 6 S. W. Rep. 881 (Tenn.).

CONSTITUTIONAL LAW—CONFINEMENT FOR DRUNKENNESS.—An Act providing that any person charged with being an inebriate, habitual or common drunkard, may be arrested and brought before a judge of a court of record for trial, and if convicted, sentenced to confinement in any inebriate or insane asylum, is in violation of Const. U. S. Amend. art. 14, §1, which declares that no State shall "deprive any person of . . . liberty . . . without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." *State v. Ryan*, 36 N. W. Rep. 823 (Wis.).

CONSTITUTIONAL LAW — INTERSTATE COMMERCE. — A statute of Indiana required every sleeping-car company incorporated under the laws of another State, and doing any business in Indiana, to pay a certain tax, based upon the proportional part of the gross receipts due to the business done within the State. *Held*, unconstitutional, because a tax upon interstate commerce. *State v. Woodruff, S. & P. Coach Co.*, 15 N. E. Rep. 814 (Ind.).

The late decisions of the U. S. Supreme Court are referred to as carrying the power of the United States over interstate commerce to the fullest extent, even to annulling the police power of the States where interstate commerce is concerned. See *Robbins v. Taxing Dist.*, 120 U. S. 489, digested in 1 HARV. L. REV. 108.

CONSTITUTIONAL LAW — INTOXICATING LIQUORS — REGULATION OF COMMERCE. — An Iowa statute forbidding any common carrier to bring within the State any intoxicating liquors from any other State or Territory without first being furnished with a certificate from the auditor of the county to which such liquor is to be transported, certifying that the consignee is a person authorized to sell intoxicating liquors, is an unconstitutional regulation of interstate commerce. Waite, C. J., Gray and Harlan, JJ., dissenting. *Bowman v. Chicago & N. W. Ry. Co.*, 8 Sup. Ct. Rep. 689.

CONSTITUTIONAL LAW — PROHIBITORY LIQUOR LAW. — A statute which provides that no person shall manufacture, or keep on his premises, any intoxicating liquors for the purpose of sale, is not rendered void as an unconstitutional regulation of interstate commerce, because the prohibition would cover the case of liquor kept for the purpose of sale without the State. *State v. Fitzpatrick*, 37 Alb. L. Jour. 290 (R. I.).

CONTRACT — RIGHT OF BENEFICIARY TO SUE. — Where a contract is entered into for the benefit of the third party, he can sue the promisor in his own name. *Hostetter v. Hollinger*, 12 Atl. Rep. 741 (Pa.).

But where the promise is made for the benefit of the promisee, *e. g.*, a promise to pay the debt of another, in which case the promise is for the benefit of the debtor, the third party cannot sue. *Austin v. Seligman*, 18 Fed. Rep. 519.

COPYRIGHT — EXTRACTS FROM BOOK. — Defendant published a pamphlet which contained about one hundred short extracts taken from complainant's book. Bill for injunction. *Held*, that if extracts had been scattered through defendant's book, so that it would be impossible to separate them from the original matter, it would be proper to apply the doctrine of confusion of goods, and enjoin the whole book; but as three-fourths of the extracts from complainant's book — and practically all to which he could lay claim as original matter — were contained in the first chapter, being the first eleven pages of the pamphlet, the injunction should extend only to this portion of the publication. *Farmer v. Elstner*, 33 Fed. Rep. 494 (Mich.).

DEED — FRAUD IN OBTAINING DELIVERY — BONA FIDE PURCHASERS. — Where the grantor of land executed a deed, and before payment of the purchase-money placed the deed in the grantee's possession, upon the fraudulent representation that he wanted it to copy field-notes of the land, *held*, that this did not operate as a delivery of the deed, and passed no title, and that one who, without knowledge, subsequently took a deed from the grantee for a valuable consideration, could not be held a purchaser for value as against the original grantor. *Steffan v. Milmo Nat. Bank*, 6 S. W. Rep. 823 (Tex.).

This would seem to be a suitable case for the application of the doctrine of estoppel; the numerous authorities cited by the Court scarcely bear out their proposition; many of them are cases of deeds given in escrow.

DEED — MISTAKE IN DESCRIPTION — PAROL EVIDENCE TO EXPLAIN. — In an action of trespass to try title between the respective grantees of R and S, the two parties to a deed, *held*, that evidence was inadmissible to show that the descriptive words in the deed were improperly used, and that other land than that described was intended to have been conveyed. Such evidence would have been admissible had the controversy been between R and S; but "vendees of S, in the absence of knowledge that a mistake in the description of the land intended to be conveyed by R to S had been made in the deed, if a mistake in this respect occurred, were entitled to rely on the description contained in the deed." *Farley v. Deslande*, 6 S. W. Rep. 786 (Tex.).

DURESS — EQUITABLE. — The plaintiff's son, about to abscond, executed to his father a conveyance of property to secure liabilities incurred on his account. One of the defendants, W, a justice of the peace, was employed to make the transfers. Soon after the son absconded the defendants obtained a bond and mortgage from the plaintiff to secure them from loss as creditors of the son. It appeared that the bond and mortgage were obtained by exciting the fears of the plaintiff, who was a farmer over 70 years old, in distressed circumstances, through the representations of W that, unless the plaintiff secured the defendants, the transfers by the son to him would be set aside as fraudulent. *Held*, that the bond and mortgage were void because of undue influence. The relation between W and the plaintiff — that of confidential adviser to effect the transfers — required W to act in good faith, without using the information obtained through that relationship to the disadvantage of his employer. "This principle holds good wherever fiduciary relations exist, and there has been a confidence reposed which invests the person trusted with an advantage in dealing with the person so confiding." *Fisher v. Bishop*, 15 N. E. Rep. 831 (N. Y.).

ESTOPPEL — JUDGMENT. — Defendant held certain notes against plaintiff. They entered into an executory agreement for a compromise, whereby less than the face value of the notes was to be accepted by the defendant. Before this agreement was carried out defendant brought suit on the notes, and plaintiff defaulted. Plaintiff now sues on the agreement. *Held*, that the judgment on the notes is no bar to this action. Where a defence constitutes cause of action it need not be set up as a defence. *Hunt v. Brown*, 15 N. E. Rep. 587 (Mass.).

EVIDENCE — CHARACTER. — In an action on a note, where the defence was that the note was given for intoxicating liquors sold to the defendant, at a time when plaintiff knew that the defendant was a person of intemperate habits (such sale by law of Alabama being illegal), it was *held*, that evidence of the general reputation of the defendant was inadmissible to prove that he was a man of intemperate habits, though admissible to show the plaintiff's knowledge of that fact. *Collins v. Jones*, 3 So. Rep. 591 (Ala.).

EVIDENCE — CRIMINAL LAW — ADMISSIBILITY OF FORMER CRIMES TO SHOW MOTIVE. — The defendant was indicted for bribing a New York alderman to grant a franchise to the Broadway Surface Railway. *Held*, that evidence that the defendant had the year previously attempted to bribe the clerk of the New York Assembly to alter a bill then pending before the Assembly, so that its terms would authorize the building of a surface railway on Broadway, was inadmissible to show motive in the defendant. This is merely character evidence, too remote and too dangerous. *People v. Sharp*, 10 Crim. Law Mag. 200 (N. Y.).

This is an extreme case. "Another act of fraud is admissible to prove the fraud charged only where there is evidence that the two are parts of one scheme or plan of fraud, committed in pursuance of a common purpose." *Jordan v. Osgood*, 109 Mass. 457. The principle that on trial for one crime evidence of another crime is admissible to show motive when the two are parts of one plan, actuated by a common purpose, has been approved in the recent Mass. case of *Com. v. Robinson*, not yet reported. The two crimes in *People v. Sharp* were part of one scheme, committed in pursuance of a common purpose, — the getting a Broadway surface railroad. The first attempt went directly to show the existence of this motive in Sharp's mind, and the strength of that motive. *Shaffner v. Com.*, 72 Pa. St., limiting this doctrine to cases where, previously to the first crime, the two crimes were contemplated in the defendant's mind as parts of the same plan or transaction, has been virtually overruled by *Goersen v. Com.*, 99 Pa. St. 388; s. c. 106 Pa. St. 477.

EVIDENCE — "EDMUNDS LAW" — COHABITATION WITH LEGAL WIFE. — In a trial under the "Edmunds Law," which provides "that if any male person cohabits with more than one woman, he shall be guilty of misdemeanor," the defendant denied cohabitation with his legal wife, A, but confessed cohabitation with B. *Held*, it is a conclusive presumption that a husband cohabits with his legal wife if he contributes towards her support and lives within her vicinity. *U. S. v. Harris*, 17 Pac. R. 75 (Utah).

EVIDENCE — FRESH COMPLAINT. — In a prosecution for rape, the defendant, on cross-examination, can ask the prosecutrix to give the particulars of the fresh complaint; and when this is done to impeach the testimony of the prosecutrix, the State can introduce evidence to corroborate her testimony. *Barnett v. State*, 3 So. Rep. 612 (Ala.).

EVIDENCE—STATUTE—PRIMA FACIE EVIDENCE.—Under Public Laws of Maine, 1887, ch. 140, providing that the payment of the United States special liquor tax shall be *prima facie* evidence that the person paying the same is a common seller of intoxicating liquors, it is error to instruct the jury that they must find a person guilty upon proof of such fact alone. Per Walton, J.: "*Prima facie* here means only 'presumptive'; otherwise, the statute would be unconstitutional. The very essence of 'trial by jury' is the right of each juror to weigh the evidence for himself, and in the exercise of his own reasoning faculties determine whether or not the facts involved in the issue are proved." *State v. Liquors and Vessels*, 12 Atl. Rep. 794 (Me.).

EVIDENCE—VALIDITY OF DEED—MENTAL CAPACITY OF GRANTOR.—In an action to set aside a deed on account of the grantor's mental incapacity, *held*, that the unnatural disposition made of the estate is competent evidence as to such incapacity. *Bressey's Adm'r v. Gross*, 7 S. W. Rep. 150 (Ky.).

HIGHWAY—DEDICATION—ESTOPPEL BY NON-ACCEPTANCE.—In a sale of land the recitals in the deed and an agreement between the parties constituted a dedication of an adjacent strip of the grantor's land as a public street. The strip was enclosed by fences and occupied by buildings, and so remained. In a suit by the city, at the end of ten years, to have it declared a street, it was *held*, that there never having been any act on the part of the city recognizing or accepting such dedication, the city acquired no right to claim the property in controversy for the purposes of a street. *City of Galveston v. Williams*, 6 S. W. Rep. 860 (Tex.).

Compare *Crocket v. City of Boston*, 5 Cush. 182, which holds that an offer of dedication is presumed to remain open a reasonable time, and that acceptance within a year and four months is acceptance within a reasonable time.

HUSBAND AND WIFE—LIABILITY OF THE FORMER FOR THE DEBTS OF THE LATTER.—Money paid by the husband as executor of his wife's estate for her funeral expenses and monument is chargeable against her estate; but a physician's bill for attending the wife during her last illness is a personal debt of the husband. *Moulton v. Smith*, 17 Atl. Rep. 891 (R. I.).

HUSBAND AND WIFE—PARTNERSHIP—SEPARATE ESTATE.—An Arkansas statute constitutes all property owned by a woman before marriage or acquired after marriage, her separate property, which she may sell or assign; she may carry on any business and perform any services on her sole and separate account; she alone may be sued therefor, and her separate property subjected to execution. In a Mississippi case involving this statute it was *held*, there being no Arkansas decision on the point, that under this statute a wife can form a valid contract of partnership with her husband. *Toof v. Brewer*, 3 So. Rep. 571 (Miss.).

The opposite result has been reached in several States having similar statutes. The case reviews the opposing decisions.

INFANCY—NEGLIGENCE—PRESUMPTION OF INCAPACITY.—In an action to recover damages for injuries to an infant between seven and eight years of age, a plea setting up the contributory negligence of the child itself, but not averring the discretionary capacity of the child, was *held* bad on demurrer. "A child between seven and fourteen years of age is *prima facie* incapable of exercising judgment and discretion." *Pratt Coal & Iron Co. v. Brawley*, 3 So. Rep. 555 (Ala.).

INSANITY—BURDEN OF PROOF.—Indictment for rape. Defence, insanity. *Held*, that "a defendant who relies upon insanity as an excuse for crime must prove the fact by a preponderance of evidence." *Coates v. State*, 7 S. W. Rep. 304 (Ark.).

The case is decided on the principle of *stare decisis*, following *Casat v. State*, 40 Ark. 511. Compare *Guiteau's Case*, 10 Fed. Rep. 161, which holds that where a defendant in a criminal action has overcome the presumption of sanity by introducing evidence tending to show his insanity, the burden is then cast upon the government to establish his sanity beyond a reasonable doubt. The burden of introducing evidence is on the defendant, the burden of proof, on the government.

INSURANCE—CONDITION AGAINST REINSURANCE.—Plaintiff insured with defendant under a condition against further insurance. He then insured in another company, with a condition against prior insurance. *Held*, that the plaintiff could not set up the voidability of the second insurance, in order to defeat the defence of breach of condition. *American Ins. Co. v. Replogel*, 15 N. E. Rep. 810 (Ind.).

Cases *pro* and *con* are collected.

INTEREST — LIQUIDATED ACCOUNT — STATEMENT RENDERED.—Where an account is not payable by contract at any particular time, the rendering of an account, without objection being made in a reasonable time, is equivalent to a demand of payment, and renders it an account stated. Interest is allowable as a matter of law from the time it thus becomes a liquidated claim. *Henderson Cotton Mfg'g Co. v. Lowell Machine Shops*, 7 S. W. Rep. 142 (Ky.).

LANDLORD AND TENANT — DEFECTIVE PREMISES — LIABILITY TO THIRD PERSON.—Plaintiff, while walking on the sidewalk in front of premises owned by defendants, but which were at the time leased to other parties, without any covenants by defendants to keep same in repair, was injured by stepping into a coal-hole, the cover of which was insufficiently secured. *Held*, that, in the absence of proof that the defect complained of existed at the time the premises were leased, plaintiff could not recover. *Johnson v. McMillan*, 36 N. W. Rep. 803 (Mich.).

LARCENY — NOTES OF TESTIMONY.—Phonographic notes of testimony taken at a trial are personal property, subject to larceny. They do not come within the exception of title-deeds and choses in action. *Territory v. McGrath*, 17 Pac. R. 116 (Utah).

LEASE — BREACH OF COVENANT TO INSURE — RELIEF IN EQUITY.—A lessee agreed to insure in a certain form, but accidentally the insurance was taken in a different form. He was willing to correct the mistake. *Held*, to be a case where equity will relieve from forfeiture for breach of condition. The English rule that equity will not grant relief from forfeitures for breach of condition to insure, does not apply to those cases where the failure is due to accident or mistake. *Mactier v. Osborne*, 15 N. E. Rep. 64 (Mass.).

The court even show a disposition to treat the covenant to insure like a covenant to pay rent, where equity will relieve although the breach was wilful, if the lessor can be put in the same position as if the breach had not occurred. It may be doubted if that is strictly possible in the case of a covenant to insure.

MANDAMUS — GOVERNOR — MINISTERIAL DUTIES.—Proceedings in mandamus to compel the Governor to declare the county seat of Grant County, as provided by statute. *Held* (1), in all purely ministerial matters, the executive officers of the State are controlled by the judiciary; (2), the judiciary decides what acts and duties are ministerial, and what ones are discretionary with the Governor. *Semble*, the courts have the right to issue a subpoena against the Governor. *Martin v. Ingham*, 17 Pac. R. 162 (Kan.).

MARRIAGE — LIVING APART — LIABILITY OF HUSBAND FOR NECESSARIES OF WIFE.—Where a husband has turned his wife out of doors on account of adultery committed by his connivance, he is liable for necessities subsequently supplied to her. *Wilson v. Glossop*, 20 Q. B. D. 354; s. c. 37 Alb. L. Jour. 273 (Eng.).

NEGLIGENCE — INJURY BY SERVANT OF CONTRACTOR TO SERVANT OF ANOTHER CONTRACTOR UNDER SAME EMPLOYER.—Two contractors, A and B, were employed on the same piece of work, B's part of the work being dangerous to A's servants near by. One of A's servants working in the place appointed by A was injured by the negligence of the servants of B. *Held*, that he could recover from B. The maxim "*Volenti non fit injuria*" does not apply. *Thrussell v. Handyside*, 20 Q. B. D.; s. c. 27 Alb. L. Jour. 274 (Eng.).

The rule stated in *Heaven v. Pender*, 11 Q. B. D., at 509, applies to this case.

NUISANCE — CHURCH-BELLS.—The plaintiff, by reason of a sunstroke, was in such a condition as to be thrown into convulsions by the ringing of a church-bell opposite his house. The pastor of the church, although requested not to do so, ordered the bell to be rung, much to the plaintiff's injury. There was no claim of express malice; but the pastor testified that he probably would not have stopped the bell even if he knew that the noise would kill the plaintiff. *Held*, that there was no ground of action against the pastor, on the familiar principle that one cannot complain of another's use of his own property without malice in a way not calculated to annoy persons in an ordinary condition. *Rogers v. Elliott*, 15 N. E. Rep. 768 (Mass.).

Quære, whether malice would have rendered the pastor's conduct actionable?

PRINCIPAL AND SURETY — RELEASE OF PRINCIPAL — EFFECT ON INDEMNIFIED SURETY.—C for whom defendant had become surety on a note in favor

of plaintiff, indemnified defendant by giving him a chattel mortgage on certain property. Plaintiff then, without consideration, released C from liability on the note. Afterwards, defendant sold his security without consent of plaintiff. *Held*, in an action on the note, that, notwithstanding the release of the principal debtor, the defendant, having been indemnified to the full amount of the note, was liable. *Jones v. Ward*, 36 N. W. Rep. (Wis.).

PROMISSORY NOTE — FRAUDULENT — PURCHASER FOR VALUE. — Where a note procured by fraud has been purchased before maturity, in good faith, without notice of such fraud, at a discount, the purchaser may recover the full amount of the note against the maker. — *Williams v. Huntington*, 16 Wash. L. Rep. 233 (Md.).

The decision repudiates the rule laid down in 1 Dan. Neg. Inst., sec. 758, that the purchaser can only recover the amount paid for the note. The case also decides that the purchase of a note at a heavy discount, and the existence of circumstances calculated to excite suspicion, do not of themselves show want of good faith in the purchaser; actual bad faith must be proved.

STATUTE OF FRAUDS — SALE OF LAND — CONTINUING POSSESSION. — Where, after a sale of land, the vendee orally agrees for a valuable consideration to allow the vendor to retain possession of the land as if no sale had been made, and to release all his title, *held*, that the vendor's possession subsequent to the agreement is not simply a continuance of his prior possession, but must be referred to the contract, and takes the oral agreement out of the operation of the Statute of Frauds. *Simmons v. Headlee*, 7 S. W. Rep. 20 (Mo.).

STATUTE OF FRAUDS — SALE OF LAND — JOINT POSSESSION OF GRANTOR AND GRANTEE. — The plaintiff having made an oral contract with the defendant for the conveyance of land, paid the purchase-money, and lived on the land together with the defendant. *Held*, that possession by the plaintiff which is not exclusive is not sufficient performance under the contract to entitle him to a decree of conveyance. *Gallagher v. Gallagher*, 5 S. E. R. 297 (W. Va.); see, also, *Pitt v. Moore*, 5 S. E. R. 389 (N. C.).

STATUTE OF LIMITATIONS — CONCEALMENT OF A WILL. — A, interested in the non-production of a will, fraudulently concealed it. *Held*, that the Statute of Limitations did not begin to run as to probating the will until after the discovery of the will, provided reasonable diligence was used in its discovery. *Appeal of Drake*, 17 Atl. Rep. 790 (Me.).

That fraudulent concealment of a tort is not a good replication to a plea of the Statute of Limitations, see Langdell's Summary of Equity Pleading (2d ed.), 128.

SUBROGATION — VOLUNTARY PAYMENT OF DEBT. — The town of Middleport, in pursuance of a statute of Illinois, voted an appropriation to a railroad company, and to raise the money issued bonds payable to bearer, which were delivered to the company, and purchased from it by the plaintiff. It turned out that the bonds were void. The plaintiff then claimed to be subrogated to any rights the company might have to enforce payment of the appropriation, on the ground that the purchase of the bonds operated as a payment of a debt due the company from the town. *Held*, that the purchase had no effect on the debt. The plaintiff bought the bonds because of the discount and interest, not to extinguish a debt. Besides, even if there was a payment of the debt, it was purely voluntary, while a person seeking subrogation must have paid the debt under some necessity. *Aetna Life Ins. Co. v. Middleport*, 8 Sup. Ct. Rep. 625.

TERM OF INJUNCTION — EFFECT OF APPEAL. — Where an injunction is by its terms limited to remain in force "only until the hearing" of a case, it was *held* that the injunction is *ipso facto* dissolved by a judgment rendered in the case, and is not continued in force by the taking of an appeal. *Fort Worth St. Ry. Co. v. Rosedale St. Ry. Co.*, 7 S. W. Rep. 381 (Tex.).

TRUST — GROUNDS FOR REMOVAL OF TRUSTEE. — Under the terms of the will creating the trust, the trustees were to pay to the plaintiff, in the exercise of their discretion, such portion of the income, "or no portion at all thereof, as they shall from time to time think fitting and proper." A state of hostility, attributable in part to the fault of the trustee, arose between the plaintiff and a trustee. No misconduct in the performance of the trust was shown. *Held*, the court will remove the trustee, for the removal appears essential to the interests of the cestui. *Wilson v. Wilson*, 14 N. E. Rep. 521 (Mass.).

REVIEWS.

LIS PENDENS. A TREATISE ON THE LAW OF LIS PENDENS, OR THE EFFECT OF JURISDICTION UPON PROPERTY INVOLVED IN SUIT. By John I. Bennett, LL. D. Chicago: E. B. Myers & Co., 1887. 8vo. pp. lxii and 57-520.

This subject is one of considerable intricacy and difficulty, and yet one which lies within comparatively narrow limits, and would seem to admit of exhaustive treatment in a volume of 500 pages. This appears to be the first attempt to deal with the law of *Lis Pendens* by itself, and the subject has received but meagre notice in the more general treatises. Hence, it might reasonably be expected that a good book would be fully appreciated by the profession. This is not a good book, — at least not very good. When a legal author proposes to himself to “keep within the line of the decided cases,” and only occasionally yield to his original judgment, and exercise the right of questioning the correctness of decisions, which seem to him vicious and without the support of reason, he is either too modest, or not modest enough. What is wanted in a text-book is not a mere statement of what each case decides, but an orderly comparison of the cases, with a statement of the conclusions to be drawn from them, and a decided opinion as to the legal standing and theoretical soundness of the decisions. If a man who wants to write a book is capable of this, let him speak out and give his brethren the benefit of his special study; if not, let him make a digest, and call it such. Mr. Bennett, like many makers of text-books, takes a middle course, and produces neither a very good text-book, nor a very good digest. An examination of the book gives one the impression that the author laboriously collected a large amount of material, and then could not handle it. The matter is poorly classified. The treatment is desultory and circuitous: it does not lead anywhere. The mystifying sub-title is an illustration of the vagueness that pervades the whole. The meaning of “jurisdiction” as there used may be inferred from a sentence on p. 87: “On the other hand, text-writers would seem to favor the view that, where courts have jurisdiction, and the *lis pendens* binds personal property, the binding force of the jurisdiction is efficient everywhere.”

In addition to this lack of directness and incisiveness there are numerous minor defects in the literary execution. The author makes frequent use of that very annoying misarrangement of words, which brings a modifier between *to* and the infinitive; *e.g.*, “held to otherwise have barred.” He makes constant use of manufactured adjectives, like “pendente lite purchaser,” “per curiam decision,” etc., without even the half-apology of italics, which, at least, disclaim any intention to smuggle in barbarisms by stealth. Little slips like “*of strictissimi juris*,” “*cum onore*,” “*obiter dicta* . . . *was* used,” and a certain fondness for Latin maxims, suggest the surmise that the author’s Latin remains with him only as a reminiscence. Occasional misspelled words and errors of syntax further detract from the general effect.

The book contains a table of cases cited, — two of them, in fact, — and a full index; but these seem to have been added in a perfunctory way, because they are conventional appendages of law books, rather than from any intention to make them useful. The table of cases, use-

less enough at best, is here rendered wholly useless by the fact that it does not state where the case is cited. The alphabetical arrangement scarcely goes beyond the first letter of plaintiffs' names, and the first table is followed by eight pages of additional cases cited, without anything to call attention to the fact that they are not all under one alphabet. It would require at least one more table of additional cases to include all the decisions on the subject, if that is what was intended. For example, only five of the fourteen cases given under *Lis Pendens*, in Kinney's Digest of the Supreme Court Decisions, appear in these lists. The index is alphabetical, only as to the principal words, and this makes its fulness its worst feature. Thus, under *Lis Pendens* is a jumble of references, five pages in length; the references to "Territorial scope of" are scattered through those five pages in three different places.

There is also an appendix of thirty-seven pages containing the Ordinances of Lord Bacon, 101 in number. These are added, because No. 12 relates to *Lis Pendens*, and they "will be of interest to the profession for ready reference."

For giving a clear idea of *Lis Pendens* the book is scarcely equal to the nine sections in Pomeroy's Equity Jurisprudence, and it is unsatisfactory as a digest, because it does not contain all the cases, and what it does contain cannot be found.

W. H. C.

THE LAW OF PARTNERSHIP. By Clement Bates. Chicago: T. H. Flood & Co. In 2 volumes. 8vo. cxciii and 1,234 pages.

Mr. Bates states very truly in his preface that "the American law [of partnership] not only has several new topics, but in many respects has developed along lines diverging from the English, and in a few respects quite opposite." The book before us aims especially to co-ordinate the American cases and formulate the principles underlying them, though English cases are also fully treated, particularly when they have affected American law.

Of the great labor and care spent in preparation there can be no question. All the decisions have been considered, and the citations of authorities are exceptionally full,—indeed, as a storehouse of cases the book leaves nothing to be desired.

The author's treatment of the subject is also in the main very satisfactory, and any exceptions to this are perhaps rather due to the incomplete state of the law of partnership than to any defect in presenting it. In a chapter entitled "The Firm as an Entity" it is truly said "there are certain parts of the law difficult to explain except upon the theory that a partnership is an entity," and a more frequent recognition of this in other chapters would have been well; for example, can the fact that a judgment against an adult partner, his minor co-partner having pleaded infancy, may be satisfied by execution against the firm property be explained on any other theory than that the judgment is regarded as really against the firm as an entity?

The rights of firm creditors to be paid out of the firm property in preference to separate creditors is treated by the author as wholly dependent on the equity of the individual partners to have the assets so applied. Such an equity the partners undoubtedly have, but whether the rights of the creditors are dependent on this may well be doubted. How and why firm creditors should be "subrogated" to the equity of the individual partners is by no means clear, and an adoption of this view seems to lead to the very undesirable result actually reached in

Pennsylvania, that if all the members of a firm sell or mortgage their respective interests the firm creditors lose their priority in the distribution of the firm assets, because the partners having parted with their interests have no longer any equity to have the firm property applied to pay the firm creditors.

The true view seems to be, that a court of equity or of bankruptcy, regarding the firm as an entity distinct from its partners, applies its property to the payment of its debts, and treats the fictitious person, the firm, in the same way that a real person would be treated. Of course, therefore, only what remains after the firm creditors are satisfied can go to the partners or their separate creditors.

The typography and general appearance of the book are exceptionally good, and the less important matter is put in smaller type, so that a rapid examination of general principles is possible. It is not too much to say in conclusion, that for an American lawyer the book will be found the most useful treatise on the law of partnership. S. W.

A MANUAL OF BUSINESS CORPORATIONS. By George F. Tucker. Boston: George B. Reed. Large 12mo. xviii and 285 pages.

This little manual does not attempt to cover the same ground as larger works on business corporations. It is a book of Massachusetts law, and relates chiefly to mercantile and manufacturing corporations, but some slight reference is made to railroad and insurance companies, and charitable societies. Little or no discussion of principles or theories is to be found, and conciseness is everywhere sought. The object is to furnish a hand-book in which may be found the statutory provisions in regard to corporations, the forms necessary for their formation, management, and winding up, and a brief statement of the points decided in the Supreme Courts of the United States and of Massachusetts, relating to the subject treated. Occasional reference is also made to cases in other jurisdictions. It makes a useful and time-saving volume. Reference to it will frequently take the place of a prolonged examination of statutes and cases scattered through many volumes.

S. W.

BOOKS RECEIVED.

A CATALOGUE OF LAW WORKS PUBLISHED BY STEVENS & SONS: 119 Chancery Lane, London, W.C. 1888.

THE LAW OF SALES OF PERSONAL PROPERTY. By Nathan Newmark. Bancroft-Whitney Co.: San Francisco. 1887.

THE MERCANTILE LAW OF ENGLAND AND THE UNITED STATES. By John William Smith, with Notes by Carter P. Pomeroy. Bancroft-Whitney Co.: San Francisco. 1887.

SHORTT ON INFORMATIONS [Criminal and Quo Warranto], MANDAMUS, AND PROHIBITION. American notes by Franklin Fiske Heard. Boston: Chas. H. Edson & Co. 1888.

ESSENTIALS OF THE LAW. Vol. III. Comprising the essential parts of Pollock on Torts, Williams on Real Property, and Best on Evidence. By Marshall D. Ewell. Boston: Charles C. Soule. 1888.

THE CONFLICT OF JUDICIAL DECISIONS. By William H. Bailey. Baltimore: M. Curlander. 1888.

A COMPENDIUM OF THE LAW OF TORTS, specially adapted for the use of students. By Hugh Fraser. London: Reeves & Turner.

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HISTORY OF THE LAW OF BUSINESS CORPORATIONS BEFORE 1800.

I.

THE most striking peculiarity found on first examination of the history of the law of business corporations is the fact that different kinds of corporations are treated without distinction, and, with few exceptions, as if the same rules were applicable to all alike. Subdivisions into special kinds are indeed made, but the classification is based on differences of fact rather than on differences in legal treatment. Thus, corporations are divided into sole and aggregate. Again, they are divided into ecclesiastical and lay, and lay corporations are again divided into eleemosynary and civil. But the division having been made, the older authors¹ proceed to treat them all together, now and then recording some minor peculiarity of a corporation sole or of an ecclesiastical corporation with one member capable.

Municipal and business corporations, so unlike according to modern ideas, are classed together as civil corporations, and treated together along with the rest. Yet the East India Company was chartered in 1600, and other trading companies had been chartered even earlier, and between 1600 and 1800 numer-

¹ *E. g.*, Coke, in Sutton's Hospital Case, 10 Rep. 1, The Law of Corporations, 1 Blacks. Com. ch. xviii., Kyd on Corporations.

ous corporations were chartered, having for their objects, trade, fishing, mining, insurance, and other business purposes. To understand how it was that the law of business corporations was so connected with that of other corporations, and how it gradually became distinguished, it is necessary to understand how such corporations grew up, and in what way they were regarded when first they came into existence.

The general idea of a corporation, a fictitious legal person, distinct from the actual persons who compose it, is very old. Blackstone ascribes to Numa Pompilius the honor of originating the idea.¹ Angell and Ames are of the opinion that it was known to the Greeks, and that the Romans borrowed it from them.² Sir Henry Maine, however, shows that primitive society was regarded by its members as made up of corporate bodies, that the units "were not individuals but groups of men united by the reality or the fiction of blood relationship," and that the family, clan, tribe, were recognized as distinct entities of society before individuals were.³ It is not surprising, therefore, to find in the Roman law the conception of corporate unity early developed. Savigny, in whose treatise⁴ may be found the best connected account of corporations in the Roman law, states that villages, towns, and colonies were the earliest. "But once established definitely for dependent towns, the institution of the legal person was extended little by little to cases for which one would hardly have thought of introducing it. Thus, it was applied to the old brotherhoods of priests and of artisans; then, by way of abstraction, to the State, which, under the name of *fiscus*, was treated as a person and placed within the jurisdiction of the court. Finally, to subjects of a purely ideal nature, such as gods and temples." Savigny then enumerates the different kinds of corporations among the Romans. The present subject is concerned with but one of these, — the business associations. "To this class belong the old corporations of artisans who always continued to exist, and of whom some, the blacksmiths, for example, had particular privileges; also new corporations, such as the bakers of Rome, and the boatmen at Rome and in the provinces. Their interests were of the

¹ 1 Blacks. Com. 468.

² Angell and Ames on Corp. (1st ed.).

³ Ancient Law (4th ed.), 183.

⁴ System des Heutigen Römischen Rechts, vol. ii. § 86 *et seq.*

same nature, and this served as the basis of their association, but each one worked, as to-day, on his own account."

"There were also business enterprises carried on in common and under the form of legal persons. They were ordinarily called *societates*. Their nature was, in general, purely contractual; they incurred obligations, and they were dissolved by the will as well as by the death of a single member. Some of them obtained the right of being a corporation, keeping always, however, the name of *societates*. Such were the associations for working mines, salt-works, and for collecting taxes."¹

This latter kind of corporation seems never to have become sufficiently numerous or important to exert a definite influence on the law. Perhaps the Romans were not a sufficiently commercial people to develop the uses of business corporations. In common with other associations the authorization of the supreme power of the State was needed to constitute them legal persons, though this might be given by tacit recognition;² and the assent of the sovereign was equally necessary for dissolution. Three members were requisite for the formation of a corporation, though not for its continued existence. The rights and duties of the fictitious person corresponded closely to those of an actual person, so far as the nature of the case admitted. It could hold and deal with property, enjoy *usufructus*, incur obligations, and compel its members to contribute to the payment of its debts, inherit by succession either testamentary or by patronage, and take a legacy. Whether it could commit a tort was a disputed question.

After the introduction of Christianity the church found numerous applications in its own organization for the doctrines which had been developed in regard to corporations, and through the church and its officials these doctrines strongly influenced the law of England, where they were applied to the existing associations.

The earliest corporate associations in England seem to have

¹ Savigny, System etc., § 88.

² Blackstone is, therefore, in error in saying (1 Com. 472) that by the civil law the voluntary association of the members was sufficient unless contrary to law—an error probably caused by the fact that penalties were imposed on certain forbidden associations in the nature of clubs for acting without the authorization of the State, and only on these.

been peace-guilds, the members of which were pledged to stand by each other for mutual protection.¹ Such brotherhoods would naturally be formed by neighbors or by those exercising similar occupations. From the tendency to associate on account of proximity of residence were developed municipal corporations; from the tendency to associate on account of similarity of occupation the craft guilds grew. These two classes of corporations were the earliest regularly chartered lay corporations in England. Both of them had their counterparts in the Roman law.² At first sight they do not seem to have much in common, but the ancient municipal corporation differed from its modern descendant. It was a real association, and membership could not be acquired simply by residing within the town limits. It exercised a minute supervision over the inhabitants, — among other things regulating trades. The guilds or companies did the same thing, only on a more restricted scale. They made by-laws governing their respective trades, which were not simply such regulations as a modern trade-union might make, since any one carrying on a trade, though not a member of the guild of that trade, was bound by its by-laws, so long as they were not opposed to the law of the land or to public policy as it was then conceived.³ In short, the guilds exercised a power similar to that exercised by the municipal corporations, and, indeed, so late as the time of Henry VI. guildated and incorporated were synonymous terms.⁴ Instead of having for its field all inhabitants of a district and local legislation of every character, the guild was confined to such inhabitants of the district as carried on a certain trade and to regulations suitable for that trade. So far as that trade was concerned the right of government belonged to the guild.

The first trades to become organized in this way were naturally the manual employments necessary to provide the community with the most fundamental necessities of civilized life. The weavers were the earliest. They received a charter from Henry II., "with all the freedom they had in the time of Henry I." The goldsmiths were chartered in 1327, the mercers in 1373, the

¹ See *History of Guilds*, Luigi Brentano.

² For an account of guilds at Rome see "*Les Sociétés Ouvrières à Rome*," 96 *Rev. des Deux Mondes*, 626, by Gaston Boissier.

³ *Butchers' Company v. Morey*, 1 H. Bl. 370; *Kirk v. Nowill*, 1 T. R. 118.

⁴ *Madox, Firma Burgi*, 29.

haberdashers in 1407, the fishmongers in 1433, the vintners in 1437, the merchant tailors in 1466.¹

During the sixteenth century the growth of the commercial spirit, fostered by the recent discovery of the New World, the more thorough exploration of the Southern Atlantic and Indian Oceans, and the search for a North-west passage, led to the establishment and incorporation of companies of foreign adventurers, similar in all respects to the earlier guilds, except that their members were foreign instead of domestic traders. Among the earliest of these were the African Company, the Russia Company, and the Turkey Company.² The last two were called "regulated companies"; that is, the members had a monopoly of the trade to Russia and to Turkey, but each member traded on his own account.

A more famous company was chartered by Queen Elizabeth in 1600, under the name of the Company of Merchants of London, trading to the East Indies.³ It had been found that the expense incident to fitting out ships for voyages, often taking several years for their completion, was too great to be borne easily by individual merchants, and it was one of the claims to favorable consideration which the East India Company put forward, that "noblemen, gentlemen, shopkeepers, widows, orphans, and all other subjects may be traders, and employ their capital in a joint stock."⁴

Sums of various amounts were subscribed, and the profits were to be distributed in the same proportions. This joint-stock adventure was not, however, identical with the corporation. Members of the corporation were not necessarily subscribers to the joint stock, and any member could, if he liked, carry on private trade with the Indies, — a privilege belonging exclusively to members. By the charter, apprentices and sons of members were to be admitted to membership in the same way as was customary in the guilds.

The East India Company was, therefore, in its early days, like the other trading companies, — an association of a class of merchants to which was given the monopoly of carrying on a particular trade, and

¹ 1 And. Hist. of Commerce, 250.

² Knight's Hist. of England, vol. v. 39.

³ What follows in regard to the East India Company is based on "The History of European Commerce with India," by David Macpherson, London, 1812, and documents therein quoted.

⁴ From the defence of the Company in the Privy Council, 2 And. Hist. Com. 173.

the right to make regulations in regard to it. Till 1614 the joint stock was subscribed for each voyage separately, and at the end of the voyage was redivided. After that, for many years, the joint stock was subscribed for a longer or shorter term of years, and at the end of each term the old stock was usually taken at a valuation by the new subscribers. Membership in the corporation, however, soon became merely a formal matter, — useless, except to those interested in the joint stock, especially as regulations were passed forbidding other members from engaging in private trading ventures to India. After 1692 no private trading of any kind was allowed except to the captains and seamen of the Company's ships. The form, however, was still retained, and every purchaser of stock who was not a member of the Company was obliged to pay a fee of £5 for membership.

At this time (1692) there were but two other joint-stock companies of any importance in England, — the Royal African Company and the recently chartered¹ Hudson's Bay Company. The outline given above will serve to indicate their general nature and also to show how something like the modern joint-stock corporation grew out of the union of the ideas of association for the government of a particular trade by those who carried it on, and of combination of capital and mutual coöperation, suggested and made necessary by the great expense incident to carrying on trade with distant countries. But the corporation was far from being regarded as simply an organization for the more convenient prosecution of business. It was looked on as a public agency, to which had been confided the due regulation of foreign trade, just as the domestic trades were subject to the government of the guilds. In a little book, entitled "*The Law of Corporations*," published anonymously in 1702,² it is said: "The general intent and end of all civil incorporations is for better government, either general or special. The corporations for general government are those of cities and towns, mayor and citizens, mayor and burgesses, mayor and commonalty, etc. Special government is so called because it is remitted to the managers of particular things, as trade, charity, and the like, for government, whereof several companies and corporations for trade were erected, and several hospitals and houses for charity."³

¹ 1670. ² This is the first English book wholly devoted to the subject of corporations.

³ *Law of Corporations*, p. 2.

This idea that the object of a business corporation is the public one of managing and ordering the trade in which it is engaged, as well as the private one of profit for its members, may also be noticed in the charters granted to new corporations, especially in the recitals, and in the provisions usually found that the newly chartered company shall have the exclusive control of the trade intrusted to it.

At the end of the seventeenth century the advantages of corporate enterprises seem to have been realized, and acts of Parliament, authorizing the king to grant charters to various business associations, were more frequent. In 1692 the Company of Merchants of London trading to Greenland was incorporated;¹ the act reciting the great importance of the Greenland trade, how it had fallen into the hands of other nations, and could only be regained by a greater undertaking than would be possible for a private individual, and the consequent necessity of a joint-stock company. In 1694 the Bank of England received its first charter.² The act authorizing it was essentially a scheme to raise money for the government. Those who advanced money to the government were to receive a corresponding interest in the bank, the capital of which was to consist of the debt of the government. No other association of more than six persons was allowed to carry on a similar business.³ Charters were also granted about this time to the National Land Bank,⁴ the Royal Lustring Company,⁵ the Company of Mine Adventurers,⁶ the famous South Sea Company,⁷ the Royal Exchange and the London (Marine) Assurance Companies.⁸ In these charters also the public interest in having the undertaking prosecuted and the great expense incident thereto are mentioned. The capital of the South Sea Company, like that of the Bank, consisted of a debt due from the government on account of money loaned by private individuals.

The extravagant commercial speculations in joint-stock companies and the stock-jobbing in their shares which characterized the early part of the eighteenth century are well known. Anderson, in his "History of Commerce,"⁹ enumerates upwards of

¹ 4 and 5 Wm. III., c. 17.

² By Stat. 6 Anne, c. 22. § 9.

³ 9 and 10 Wm. III., c. 43.

⁴ 9 Anne, c. 21.

⁵ Vol. i. (1st ed.) 291 *et seq.*

⁶ 5 and 6 Wm. III., c. 20.

⁷ 7 and 8 Wm. III., c. 31.

⁸ See 9 Anne, c. 24.

⁹ 6 Geo. I., c. 18.

two hundred companies formed about the year 1720, for the prosecution of every kind of enterprise, including one for the "Insurance and Improvement of Children's Fortunes," and another for "Making Salt Water Fresh." With very few exceptions, these companies were not incorporated, and in 1720 writs of *scire facias* were issued,¹ directing an inquiry as to their right to carry on business, in usurpation of corporate powers. This put a sudden end to many of these unfortunate ventures, and the consequent collapse of the enormously inflated public credit carried down others, so that only four of the long list were still in existence when Anderson wrote,—the York Buildings Company, the two Assurance Companies mentioned above, and the English Copper Company. The speculation in shares had been too great and the expectations of profit too extravagant not to cause a correspondingly great distrust in corporate enterprises when the bubble burst, and the profits realized were found to be small and extremely variable. Adam Smith, writing in 1776, was of opinion,² that "the only trades which it seems possible for a joint-stock company to carry on successfully without an exclusive privilege, are those of which all the operations are capable of being reduced to what is called routine, or to such a uniformity of method as admits of little or no variation. Of this kind is, *first*, the banking trade; *secondly*, the trade of insurance from fire, and from sea risk and capture in time of war; *thirdly*, the trade of making and maintaining a navigable cut or canal; and, *fourthly*, the similar trade of bringing water for the supply of a great city." To render the establishment of a joint stock reasonable, however, the author says, two other circumstances should concur: first, "that the undertaking is of greater and more general utility than the greater part of common trades; and, secondly, that it requires a greater capital than can easily be collected into a private copartnery."

But during the latter part of the eighteenth century corporations were gradually increasing in number and importance. The need for them was felt in establishing canals, water-works, and, to some extent, in conducting the growing manufactures of the kingdom. The progress was indeed slow, and was destined to be so until the introduction of gas-lighting into all the larger cities and

¹ And. Hist. Com., Vol. ii. 296.

² Wealth of Nations, book v. ch. i. art. 5.

towns early in the present century, and later the laying of railways, created a wide-spread necessity for united capital.

The outline sketch just given of the growth of business corporations shows that they are not a spontaneous product, but are rather the result of a gradual development of earlier institutions, running back farther than can be traced. It would be strange if signs of this development were not found in the history of the law relating to them. The natural expectation would be, and such is in fact the case, that as to the points which modern business corporations have in common with the early guilds and municipalities, the law relating to them dates back farther than almost any other branch of the law, while as to the points which belong exclusively to the conception of the business corporation, the law has been formed very largely since 1800. And not only had a body of new law to be thus formed, but old doctrines laid down by early judges as true of all corporations, though in reality suited only to the kinds of corporations then existing, had to be discarded or adapted to changed conditions.

In the first place, then, the endeavor will be to examine the points which belong essentially to every kind of corporation, and afterwards to consider what was settled before the present century in regard to the peculiar relations arising from the nature of a business corporation.

In the case of *Sutton's Hospital*,¹ decided in 1612, the general law of corporations was considered at some length, and the following things were said to be "of the essence of a corporation":² 1st, Lawful authority of incorporation, and that may be by four means, viz., by the common law, as the king himself, etc.; by authority of Parliament; by the king's charter; and by prescription. The 2d, which is of the essence of the incorporation, are persons to be incorporated, and that in two manners; viz., persons natural, or bodies incorporate and political. 3d, A name by which they are incorporated. 4th, Of a place, for without a place no incorporation can be made. 5th, By words sufficient in law, but not restrained to any certain, legal, and prescript form of words."

This, then, was the mould in which every corporation had to be cast, regardless of what might be its nature or its purpose.

The first requirement, due authorization, existed in the Roman

¹ 10 Rep. 22 b.

² 10 Rep. 29 b.

law as well as in English.¹ But, since corporate bodies were recognized as facts from the earliest dawn of history, when the rule became recognized that the authority of the supreme power of the State was necessary for their formation, a theory had to be found to support the old associations, which had not been formed in accordance with the rule. This was done both in Roman and in English law by recognizing that a corporation could come into existence by prescription. It is safe to say, however, that prescriptive and common-law corporations, were of the older forms only, and that for the formation of business corporations, from the first, a charter from the king directly or by authority of Parliament was necessary.

Originally the power was exercised exclusively by the king; but his power to grant charters allowing exemptions or monopolies was gradually restricted, like many of his other powers, as little by little the House of Commons assumed the entire effective control of the government. The regulated Russia Company received its charter from the crown in 1555 without the consent of Parliament; so did the East India Company in 1600, the Canary Company in 1665, the Hudson's Bay Company in 1670. All of these companies were given monopolies. The rights of the Russia Company and of the East India Company were afterwards regulated by statute; and the patent of the Canary Company was soon withdrawn, though not before giving rise to a test case² on the validity of the monopoly, in which the court decided against it. The Hudson's Bay Company continued to enjoy its charter without interference, but its right to a monopoly held good so long only as nobody cared to dispute it. After the Revolution, no doubt, it was tacitly admitted that for the validity of a charter conferring a monopoly or other special privilege an act of Parliament was necessary, though for granting the simple franchise of acting as a corporation the patent of the king was sufficient.

The last of the requisites enumerated by Coke may be regarded as included within the first. "Lawful authority of incorporation" must necessarily be given "by words sufficient in law." The necessity for persons to compose the corporation results from the nature of things rather than from any rule of law. Perhaps the same may be said of the importance of a name. As an actual

¹ See *supra*, p. 107.

² *Horne v. Ivy*, 1 Ventr. 47.

person could hardly transact business or sue and be sued in the courts without a name, so the fictitious person of a corporation rests under a similar necessity. Possibly Coke meant something more, regarding a corporation as an abstraction which would have no existence without a name. "For a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law."¹ But if such was his view, it was not shared by his successors, when the tinge of scholasticism which colored all the law of the period faded away. In the case of the Dutch West India Company *v. Van Moses*,² decided in 1724, it was held that the action was well brought, though no certain name had been given the company by the Dutch States, the name being that by which it was usually called; and there are numerous cases to the effect that a technical misnomer of a corporation had even less effect than the misnomer of an individual.³

When Coke wrote, it seems to have been necessary that a corporation should be named as of a certain place.⁴ This requirement, apparently so fanciful, is explained by the fact that the early corporations were almost all formed for local or special government of some kind, and it was consequently necessary to designate the place where the jurisdiction was to be exercised. The requisite must very early have become merely formal in case of certain classes of corporations, and might be fictitious. Thus, such names may be found as, "The Hospital of St. Lazarus of Jerusalem in England" and "The Prior and Brothers of St. Mary of Mt. Carmel in England."⁵ As the purpose for which corporations were instituted became more varied, and the modes of thought of lawyers became more reasonable, less stress was laid on the formality under consideration. It is hardly mentioned in "The Law of Corporations" or in Blackstone's chapter.⁶ Kyd merely says, "It is generally denominated of some place;"⁷ and it may be assumed as true of business corporations, as well as of most others, that before the beginning of the present century there was no

¹ Sutton's Hospital Case, 10 Rep. 32.

² 1 Stra. 612; and see the Law of Corporations, 13. Also, if the name of a corporation be changed, it retains its possessions, debts, etc. Bishop of Rochester's Case, Owen, 73; s. c. 2 And. 107; Luttrell's Case, 4 Rep. 87 b; Mayor of S. v. Butler, 3 Lev. 237; Haddock's Case, 1 Vent. 355.

³ Kyd, 236 *et seq.*

⁵ Rol. 512.

⁷ 1 Kyd, 228.

⁴ Button *v.* Wrightman, Cro. Eliz. 338.

⁶ Blacks. Com. ch. xviii.

force in Coke's fifth essential for the existence of a corporation other than as a matter of convenience.¹

Grant, now, that a corporation was legally called into being, what abilities and disabilities was it considered to have? Coke says:² "When a corporation is duly created all other incidents are tacitly annexed — . . . and therefore divers clauses subsequent in the charters are not of necessity, but only declaratory and might well be left out; as —

"1st. By the same to have authority, ability, and capacity to purchase, but no clause is added that they may alien, etc., and it need not, for it is an incident.

"2d. To sue and be sued, implead and be impleaded.

"3d. To have a seal; that is also declaratory, for when they are incorporated they may make or use what seal they will.

"4th. To restrain them from aliening or devising but in certain form; that is an ordinance testifying the king's desire, but it is but a precept and does not bind in law.

"5th. That the survivors shall be a corporation; that is a good clause to oust doubts and questions which might arise, the number being certain.

"6th. If the revenues increase, that they shall be used to increase the number of the poor, etc.; that is also explanatory.

"8th. To make ordinances; that is requisite for the good order and government of the poor, etc., but not to the essence of the incorporation.

"10th. The license to purchase in mortmain is necessary for the maintenance and support of the poor, for without revenues they cannot live, and without a license in mortmain they cannot lawfully purchase revenues, and yet that is not of the essence of the corporation, for the corporation is perfect without it."

This list of attributes laid down by Coke as necessarily belonging to all corporations is quoted with approval in "The Law of Corporations."³ It is given by Blackstone in substance, though altered to the following form:⁴

The incidents which are tacitly annexed to every corporation as soon as it is duly erected are —

¹ See *Mayor of Stafford v. Bolton*, 1 B. & P. 40.

² *Sutton's Hospital Case*, 10 Rep. 30, citing as authority 22 Edw. IV., Grants, 30.

³ p. 16.

⁴ 1 Blackst. Com. 475; also in Wood's Inst. of the Laws of Eng., bk. i. ch. viii.

"1st. To have perpetual succession. This is the very end of its incorporation, for there cannot be a succession forever without an incorporation, and therefore all aggregate corporations have a power necessarily implied of electing members in the room of such as go off.

"2d. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may.

"3d. To purchase lands and hold them for the benefit of themselves and their successors, which two are consequential of the former.

"4th. To have a common seal. . . .

"5th. To make by-laws or private statutes for the better government of the corporation, which are binding on themselves, unless contrary to the law of the realm, and then they are void."

The enumeration of Blackstone is given without substantial alteration by Kyd,¹ though he adds that the last two powers are unnecessary for a corporation sole, and that the right to make by-laws is not inseparably incident to all kinds of corporations aggregate, for there are some to which rules may be prescribed; and, further, that the list is not exhaustive. The first three capacities are reducible to this, that the fictitious person of the corporation shall have, in general, the capacity of acting as an actual person, so far as the nature of the case admits. Such must have been the recognized law ever since corporations, as we understand the word, existed; for the conception of a corporation as a legal person, a conception going back farther than can be definitely traced, involves necessarily the consequence that before the law the corporation shall be treated like any other person. To this consequence there is a necessary exception in regard to such rights and duties as require an actual person for their subject.

The right and the necessity of having a corporate seal was probably in its origin simply the result of treating a corporation in the same way as an individual. The great antiquity of the custom of using seals is well known. It prevailed among the Jews and Persians,² as well as among the Romans. It was spread over all the countries whose systems of law were borrowed from the Romans, and it was introduced into England by the Normans.³

¹ Vol. i. p. 69.

² 2 Blackst. Com. 305; Genesis, xxxviii. 18; Esther, viii. 8; Jeremiah, xxxii. 10.

³ 2 Blackst. Com. 306.

In England, owing to the generally prevailing illiteracy, the use of the seal became the ordinary way of indicating the maker of a charter. The practice, apparently, was not the result of a desire for peculiar solemnity, but merely for indentification. The use and object of a corporate seal may be assumed to have been the same as of an individual seal. It is true that Blackstone¹ finds a reason for its use in the fact that "a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its common seal." But this reason, besides bearing on its face indications of having been invented after the fact, goes altogether too far. A corporation has no hand with which to affix its seal, and if it may perform that act by an agent, there is no reason in the nature of things why it should not do anything else by the same instrumentality.² And in the Roman law the use of a common seal was only a possible, not a necessary, way for a corporation to act.

When writing became a general accomplishment, the use of a seal for private documents was reserved for instruments of a peculiarly formal or solemn character. That a similar transition did not take place in the use of the seal of a corporation may be ascribed to the natural conservatism of a number of men acting in a body, and to the fact that from the character of early corporations the inconvenience of sealing all corporate contracts was not likely to be felt. However this may be, it was a rule of law well settled before business corporations came into existence that a corporation could only act by deed under its common seal. To the rule some slight exceptions were allowed, but only in few cases. Such a restriction could not fail to be extremely embarrassing to corporations, when they afterwards sprang up, the object of which was to carry on trade; and the development of the law on this point in regard to such corporations shows not so much a growth of legal doctrine, as an endeavor to do away with the inconvenient restraint imposed on all aggregate corporations, which had its origin when guilds and municipal and ecclesiastical associations were the only corporate bodies,—an endeavor that met with but indifferent success.³

The general rule seems to have been well settled in the fifteenth

¹ 1 Com. 475.

² 1 Blackst. Com. (Sharswood's ed.) 475, n. 7.

³ Taylor on Evidence (8th ed.), § 976 *et seq.*

century, and it also appears that there were some slight exceptions to it.¹ Just what these were, was by no means definitely marked out. In *Y. B. 4 Hy. VII. 17 b*, one of the judges, Townsend, said: "A body corporate cannot make a feoffment or lease or anything relating to their inheritance without deed, but of offices and things which pertain to servants they can. For they can appoint plowmen and servants of husbandry without deed, and butlers and cooks and things of that kind, and can depute their servants to do anything without deed. They can do this because it is not in disinher- itance of the corporation, but only by way of service, and it is the common course to justify by command of the body corporate, and not show anything from it." Brian, however, was of a con- trary opinion, saying, "A body corporate can do none of those things without deed." Townsend's opinion undoubtedly made more sweeping exceptions than were afterwards allowed, but his statement that a corporation could appoint a cook or butler without a deed was for centuries cited as indicating the extent of the power of acting without using the corporate seal.² In *Y. B. 7 Hy. VII. 9*, it was held that the defendant in an action of trespass could not justify as acting for a corporation without showing authority by deed. Wood adds: "But of little things the law is otherwise, for it would be infinite if each little act was by deed, as, a command to their servants, to light a candle in church, or to make a fire, or such things." With this the court with one excep- tion agreed. This statement of the law is based on a principle which continued to be decisive in the eighteenth as in the six- teenth century. In transactions which from their nature could be done under seal only with great inconvenience, the formality of sealing was dispensed with. The inconvenience might arise from the pettiness of the act, or from its being of every-day occurrence and necessity, or from the importance of immediate action. The exception was wrested by common sense from the scope of the rule.

Accordingly, when business corporations arose, it must have been tacitly admitted that the daily business need not all be transacted under seal. For instance, the bills of the Bank and of the East India Company were never sealed. The right to make

¹ *Y. Bks. 9 Edw. IV. 39, 4 Hy. VII. 17 b, 7 Hy. VII. 9.*

² *Horne v. Ivy*, 1 Vent. 47; *Dunston v. Imp. Gas Co.*, 3 B. & Ad. 125, 129; *Tilson v. Warwick Gas Co.*, 4 B. & C. 962, 964.

such bills was afterward defended and explained as necessarily implied in the powers given them by Parliament. These corporations "could not carry on their business without the making of such instruments, and they would cease to be bills or notes if under seal. It is clear, however, that this indulgence is not allowed by law to be extended beyond cases of absolute necessity."¹

A more difficult point was raised in 1717, in the case of *Rex v. Bigg*,² the leading case before the present century on the extent to which a business corporation could act without the use of its seal. Bigg was charged with felony in altering a bank-note signed by one Adams, an officer of the bank. It was objected that Adams did not have authority under the seal of the bank to affix his name, and that consequently the altered instrument was not a valid obligation, and the prisoner was not guilty of forgery. The argument of Peere Williams for the prisoner is fully given, and the cases which he cites seem to bear him out in his contention that such an agent could not be appointed without deed; but a majority of the court held the prisoner guilty of felony. No opinion is given. It must be admitted that the decision involved some extension of the old rule that a cook or butler or servant for some petty purpose could be retained without a sealed instrument, but after this the law was settled that the regular servants and agents of a business corporation were to be regarded in a similar way.³

But, granting this, how far could an agent of such a corporation act in its behalf without a deed? As mentioned above, a corporation, the charter of which authorized it to carry on a business that required for its proper exercise the issue of bills and notes, did not need to affix the common seal to such obligations. Undoubtedly, also, a large amount of routine business was transacted entirely by parol, and there is no case reported where a transaction executed on both sides was set aside because the corporation did not act by deed. But, for the rest, it may at least be said that till after the first quarter of the present century had passed, no unsealed executory contract was binding on either party;⁴ and it is probable, also, that in a partially executed transaction no special

¹ *East London Waterworks Co. v. Bailey*, 12 Moore, 532; s. c. 4 Bing. 283; and see *Edie v. E. I. Co.*, 2 Burr. 1216 where assumpsit was brought against the Company on a bill of exchange, without objection.

² 3 P. Wms 419.

³ *Bac. Abr.*, tit. Corporation (E) 3; 1 Kyd on Corp. 26.

⁴ *East London Waterworks v. Bailey*, 12 Moore, 532; s. c. 4 Bing. 283.

agreement was valid without seal. On the other hand, if the transaction was such as of itself gave rise to an obligation, it could be enforced; forfeitures and tolls could be recovered in *assumpsit*; ¹ if land were demised without deed, and the lessee occupied the premises, he was liable for rent in an action for use and occupation; and similarly, no doubt, if goods were bought or sold by a corporation and delivery was made, the vendee could have been forced to return or pay for them.²

The courts were sometimes able to mitigate the hardships which followed from the necessity of doing everything under seal, by presuming, as a matter of pleading, that when performance by a corporation was averred, performance with all necessary formalities was intended,³ and partial relief was given in special instances by act of Parliament;⁴ but at best it would be hard to find a more striking instance of a rule of law which arose from the customs prevailing in an entirely different state of society still maintaining itself when every reason for its existence had ceased, and its only effect was to produce injustice.

The right to pass by-laws for the regulation of their affairs belonged to corporations in the Roman law⁵ from a very early period, and also in the English law. Indeed, the right is a consequence almost necessarily following from the nature of the early corporations. Institutions to which were delegated powers of government, whether ecclesiastical or secular, whether exercised over all within a certain locality or confined to those practising a particular trade, must have been allowed appropriate means of exerting their authority, and the scope of the by-laws must have been proportioned to the jurisdiction. Thus, the by-laws of a corporate town were binding on any one who came within its limits.⁶ The by-laws of a guild were binding not on its members only,

¹ *The Barber Surgeons v. Pelson*, 2 Lev. 252; *Mayor of London v. Hunt*, 3 Lev. 37; and see *Parbury v. Bank of England*, 2 Doug. 524, where, at the suggestion of Lord Mansfield, a special action of *assumpsit* was brought on account of the bank's refusal to transfer stock on the books.

² *E. I. Co. v. Glover*, 1 Stra. 612.

³ *Edgar v. Sorell*, Cro. Car. 169; *Tilson v. Warwick Gas Co.*, 4 B. & C. 962; *Rex v. Bigg*, 3 P. Wms. 419.

⁴ *E. g.*, 11 Geo. I. c. 30, § 43, which allowed the two insurance companies recently chartered to make use of the freer pleading in vogue in the action of *assumpsit* when sued on their policies, which were under seal.

⁵ Dig. xlvii. 22, lex 4.

⁶ *Cuddon v. Eastwick*, 1 Salk. 193, pl. 5.

but on such outsiders as exercised the trade which the guild governed and regulated.¹ The power of making by-laws would be useless without means of enforcing them, and the imposition of penalties for failure to comply with its by-laws was within the power of a corporation, from an indefinite time.² The farther back the examination is carried the broader seems to have been the power of punishing the refractory, extending by special charter in many cases to imprisonment as well as fine.³ By Coke's time, however, it was settled that the power of imprisonment could not be given by letters-patent from the king, but required an act of Parliament;⁴ and it was further held that similar authority was needed for a by-law affixing as a penalty the forfeiture of goods;⁵ but that such by-laws were formally valid may be inferred from the fact that this mode of enforcement was sometimes supported as being in accordance with an immemorial custom.⁶ Further limitations on the power of making by-laws, which were more strictly construed as time went on, were that they must not be contrary, nor even cumulative, to the statutes of Parliament,⁷ nor in restraint of trade,⁸ nor unreasonable.⁹ Business corporations, when they arose, were dealt with according to the same principles. As it was well recognized that such by-laws only could be made as were in harmony with the objects for which the corporation was created,¹⁰ and as the purposes for which business corporations were chartered were as a rule definitely marked out, the scope of the right to make by-laws was correspondingly narrowed. A few of the earlier joint-stock companies were intrusted with the regulation of the trade in which they were engaged, and the by-laws of these were binding on all engaged in the trade, precisely as was the case with guilds.¹¹ But by the change in the conception of a

¹ *Butchers' Co. v. Morey*, 1 H. Bl. 370; *Kirk v. Nowill*, 1 T. R. 118.

² *The Law of Corp.* 209.

³ *Grant on Corp.* 86, especially notes d and f.

⁴ *Towle's Case*, Cro. Car. 582; *Chancey's Case*, 12 Rep. 83.

⁵ 8 Rep. 125 a; *Horne v. Ivy*, 1 Vent. 47; *Clarke v. Tuckett*, 2 Vent. 183; *Nightingale v. Bridges*, 1 Show. 135.

⁶ *Clearywalk v. Constable*, Cro. Eliz. 110; *Sams v. Foster*, Cro. Eliz. 352; s. c. *Dyer*, 297 b.

⁷ *Grant on Corp.* 78.

⁸ *Ibid.* 83.

⁹ *Ibid.* 80.

¹⁰ *Child v. Hudson's Bay Co.*, 2 P. Wms. 207; 2 Kyd on Corp. 102.

¹¹ *E.g.*, the East India Company in its early days regulated the right of private trading with the Indies, and soon forbade it altogether. It endeavored to enforce this rule against

corporation from an institution for special government to a simple instrumentality for carrying on a large business, the right to pass by-laws was restricted to regulations for the management of the corporate business.¹ Such regulations, of course, like the by-laws of municipal corporations and guilds, were void if contrary to statutory or common law, or if unreasonable. Whether a certain by-law was held unreasonable or not depended in some measure on the discretion of the court. The decision might be different when judged by the standards of the eighteenth century from what it would be if judged by modern standards. Thus, a by-law of the Hudson's Bay Company giving itself a lien on its members' stock for any indebtedness due from them to the Company was held valid,² the court saying, "All by-laws for the benefit and advantage of trade are good unless such by-laws be unreasonable or unjust; that this, in their opinion, was neither." To-day, in a jurisdiction unfettered by authority, the conclusion would probably be otherwise.³

In addition to the doctrines which have just been considered, a few others may be mentioned as applicable to all corporations alike. In general, questions of rights and duties towards the outside world are much the same for all kinds of corporations. The law, it is said, makes no personal distinctions, and it is at least true that wherever considered practicable the fictitious legal person of a corporation, whatever its nature, was treated by the law in the same way as an actual person. On the other hand, the law regulating the relations of the members to each other and to the united body must differ according to the nature and objects of the corporation.

It has often been questioned whether a corporation could commit a tort or crime. The better opinion in the Roman law seems to

a non-member by forfeiture of his vessel. He petitioned the House of Lords, which ordered the Company to put in its answer. The case finally resulted in a quarrel between the Lords and the Commons as to the right of the former to take jurisdiction. The Lords gave judgment for the plaintiff, but it was never executed. Macpherson, Hist. 127. See, also, *Horne v. Ivy*, 1 Ventr. 47.

Further illustrations of by-laws of business corporations binding on the public may be found in the regulations passed by early canal and railway companies in accordance with 6 Geo. IV. c. 71, and 8 and 9 Vict. c. 20, § 109.

¹ *Child v. Hudson's Bay Co.*, 2 P. Wms. 207.

² *Child v. Hudson's Bay Co.*, 2 P. Wms. 207, re-argued *sub nom.* *Gibson v. Hudson's Bay Co.*, 1 Stra. 645; s. c. 7 Vin. Abr. 125.

³ *Lowell*, Transfer of Stock, § 166.

have been that the question should be answered in the negative, at least whenever *dolus* or *culpa* was necessary to make the act under consideration wrongful.¹ In England, however, it was very early held that corporations might be liable in actions on the case or in trespass,² and afterwards in trover.³ But it is not likely that a corporate body would have been held liable for any tort of which actual malice or *dolus* was an essential part. Similarly it was held that a corporation could not be guilty of a true crime,⁴ that is, it could not have a criminal intent, but it could be indicted for a nuisance or for breach of a prescriptive or statutory duty, and, in general, where only the remedy was criminal in its nature.⁵

It was generally laid down that a corporation could not hold in trust.⁶ It is not very clear exactly on what reasoning the conclusion was based. There is very little to support it, except in very old cases. The view gradually became obsolete, and though there was no decision before the year 1800 definitely deciding the point, it is probable that it was recognized before that time that a corporation might hold in trust.⁷

Samuel Williston.

CAMBRIDGE, May 31, 1888.

(To be continued.)

¹ Savigny, System, §§ 94, 95.

² See Grant on Corp. 277, 278, and notes, in which are cited many cases from the Year Books:

³ *Yarborough v. Bank of England*, 16 East, 6.

⁴ *Anon.*, 12 Mod. 559; that it cannot commit treason see Vin. Abr., Corpor. Z, pl. 2.

⁵ Grant on Corp. 283, 284.

⁶ The authorities are collected in Gilbert on Uses, 5, 170, and Sugden's note.

⁷ See Atty.-Gen. *v.* Stafford, Barnard. Ch. 33.

LIQUOR STATUTES IN THE UNITED STATES.

IN the following pages I have endeavored to group all the provisions regulating and restricting the manufacture and sale of intoxicating liquor which appear in our statute books, hoping both to set forth the several systems and to note the States in which their respective operation may be studied, my object being to supply condensed statistical information to the social or political student of the liquor question.

As it seems that every system hitherto tried in the United States still appears on the statute books of some State, though it may have been elsewhere discontinued, I will not make an historical examination of the subject, but will treat of the existing laws under the headings of Prohibition, Local Option, License, the Civil Damage Acts, and Constitutional References.

For this purpose I have outlined a composite statute for each class of enactments, giving a reference for every feature, without attempting to indicate each State in which that feature appears, but appending a general index which will supply this information.

PROHIBITION.

The aim of this system is to prevent within the State the sale of intoxicating liquor as a beverage, and the enactments to fulfil that purpose are complete and stringent.

Offences. — No person shall manufacture, sell, keep for sale, give, or furnish intoxicating liquor.¹

Provided, that druggists or town agents (whose position we will discuss later) may sell for medical, mechanical, artistic, scientific, or sacramental purposes.²

Houses kept for the illegal sale of liquor are common nuisances.³

So also clubs for sale, gift, or distribution.⁴

The lessor of such buildings, with knowledge of the sale or intent to sell, is punishable.⁵

¹ Comp. Laws Kansas, 1885, ch. 35, s. 2287.

² Rev. Code Io. 1880, s. 1526.

³ Rev. Code Io. 1880, s. 1543.

⁴ Laws of R. I., Jan'y Session, 1887, ch. 634, s. 14.

⁵ Gen'l Laws N. H. 1878, ch. 109, s. 15, s. 34.

Common carriers must obtain a certificate from the county auditor that the liquors are in transport to a town agent,¹ and must not deliver to one intending to violate the law.² Moreover, any traveller bringing liquors to a person with knowledge of his intent to sell,³ or taking orders for purchase,⁴ is guilty of a misdemeanor.

Any person selling liquors three times within six months is a common seller.⁵ No person shall keep a drinking shop,⁶ or advertise the sale of liquors.⁷

Enforcement. — To execute these laws local special constables are appointed,⁸ the existing officers are enjoined to make extra efforts,⁸ and, if the local force in a county be lax, thirty or more tax-payers therein may petition the governor to appoint State constables for such district.⁹

The officers may enter and search suspected premises by warrant, issued under written information on oath of any citizen, male or female,¹⁰ or without a warrant on reasonable cause to suspect a sale.¹¹ They may arrest, without a warrant, a person found in the act of sale or transportation, and may seize all liquors and all appliances for sale.¹²

Prosecutions. — It shall be the duty of the district attorney,¹³ the attorney-general,¹⁴ or the selectmen¹⁵ to prosecute under this law. But in those States where buildings kept for illegal sale are declared common nuisances a private citizen may get an injunction,¹⁶ or may abate the nuisance.¹⁷

Evidence. — The finding of intoxicating liquors in a place other than a dwelling-house,¹⁸ the exposure of signs, bottles, or United States coupon receipts,¹⁹ the delivery from stores, steamers, or wagons used as places of common resort,²⁰ are all *prima facie* evidence of sale or intent to sell.

¹ Laws of Io. 1886, ch. 66, s. 10.

⁸ Laws of N. H. 1887, ch. 53.

⁵ Laws of R. I. 1886, ch. 596, s. 14.

⁷ Acts of Me. 1885, ch. 366, s. 8.

⁹ Acts of Me. 1885, ch. 366, s. 7.

¹¹ Laws of R. I., Jan'y Session, 1887, ch. 639, s. 1.

¹² Laws of R. I., Jan'y Session, 1887, ch. 634, s. 10.

¹³ Laws of Io. 1886, ch. 66, s. 1.

¹⁴ Laws of R. I., Jan'y Session, 1887, c. 634, s. 4.

¹⁵ Gen'l Laws of N. H. 1878, ch. 109, s. 27.

¹⁷ Laws of Io. 1886, ch. 66, s. 1.

¹⁹ Gen'l Laws of N. H. 1878, s. 25.

² Comp. Laws Kans. 1885, ch. 35, s. 2317.

⁴ Acts of Me. 1885, ch. 366, s. 1.

⁶ Acts of Me. 1887, ch. 140, s. 7.

⁸ Laws of R. I. 1886, ch. 596, s. 36.

¹⁰ Laws of Vermont, 1886, No. 38, s. 1.

¹⁶ Comp. Laws of Kans. 1885, s. 2299.

¹⁸ Laws of Io. 1886, ch. 66, s. 8.

²⁰ Gen'l Laws of N. H. 1878, ch. 109, s. 24.

Penalties.—The penalties under this system are, for a sale, from \$30–\$100 fine, 30–90 days' imprisonment, or both.¹ For keeping a nuisance, \$300–\$1,000 fine, forfeiture of the liquors and appliances, and the closing of the building for one year.² One-half of these fines goes to the informer and the remainder to the school fund of the district.³

The forfeited liquors if unfit for use are destroyed, otherwise they are delivered to the town agent to be sold for the benefit of the district.⁴

Town Agents and Druggists.—Permits to sell for medical, mechanical, scientific, artistic, or sacramental purposes may be issued to any person who is not a hotel, saloon, restaurant, or grocery keeper.⁵ If a druggist, he must have \$500 worth of other goods in his store.⁶ The applicant for such permit must present a certificate of good character, signed by a majority of the electors in his district,⁷ or he must present a petition signed by twenty reputable freeholders and electors, and twenty-five reputable women over twenty-one.⁸

The applicant must give a bond conditioned on obedience to the law, and must keep a book of receipts and sales.⁹

Town agents are paid a fixed salary,¹⁰ or their profits are limited.¹¹

A druggist can make only one sale on each prescription,¹² must not sell to a minor without the written consent of his parent or guardian,¹³ and an unlawful sale deprives him of the right to practice as a pharmacist for five years.¹⁴

Manufacturers.—An applicant for a permit to manufacture intoxicating liquors must present a petition signed by one hundred voters of the ward, in a city of the first or second class, or by a majority of the voters of the township or city of the third class.

He must give a bond for \$10,000, and can sell only in the origi-

¹ Laws of Me. 1885, ch. 366, s. 2.

³ Laws of Io. 1884, ch. 143, s. 9.

⁶ Rev. Code Io. 1880, s. 1526.

⁷ Rev. Code Io. 1880, s. 1527.

⁹ Rev. Code Io. 1880, ss. 1528, 1533.

¹¹ Rev. Code Io. 1880, s. 1537.

¹³ Laws of R. I., Jan'y Session, 1887, ch. 634, s. 2.

¹⁴ Laws of R. I., May Session, 1886, ch. 596, s. 5.

² Laws of Io. 1886, ch. 66, ss. 4, 5.

⁴ Laws of Me. 1885, ch. 359, s. 8.

⁶ Laws Kans. 1887, ch. 165, s. 1.

⁸ Laws of Kans. 1887, ch. 165, s. 1.

¹⁰ Gen'l Laws of N. H. 1878, ch. 109, s. 9.

¹² Act of S. C. 1884, No. 495.

nal packages to druggists with permits. The manufacturer's permit lasts five years.¹

Exceptions.—In Prohibition States it is permitted to sell wines or beer containing less than two per cent. of alcohol and not intoxicating,² or cider, and persons may manufacture liquor for their own use.³

Payments.—No action will lie for the price of liquors illegally sold,⁴ and money paid therefor may be recovered.⁵

LOCAL OPTION.

Akin to State prohibition is the Local Option system; indeed, the purpose of each is the same, namely, to stop the sale of liquor as a beverage.

Prohibition by local option, however, is effected by a popular vote without the intervention of representatives, and affects restricted political divisions of the State.

The main points of interest are the provisions for taking the popular will, and the divisions of the State to which the option is limited.

The regulations as to druggists or town agents, constabulary and evidence, are much the same as those of the prohibitory systems.

Elections.—In order to avoid a confusion of this question with party politics, it is usually brought up at a special election, called by the county commissioners, county court, or probate judge, on the petition of from ten⁶ to two hundred⁷ voters, or of one-tenth⁸ or one-quarter⁹ of the electors of the county.

Thirty to sixty days' notice must be given, and, in some States, if that bring the election near the time of any State election, it shall not be held till thirty to sixty days thereafter.¹⁰

Elsewhere it can only be held on annual election days.¹¹

Divisions.—There is much variation in the nature of the political divisions to which this option is accorded. Separate elections may be held in election districts, towns, and counties.¹²

¹ Laws Kansas, 1887, ch. 165, s. 6.

³ Laws Vt. 1882, No. 41.

⁵ Rev. Code Io. 1880, s. 1550.

⁷ Laws of Texas, 1887, p. 96.

⁹ Laws of Florida, 1887, ch. 3700.

¹¹ Laws of Minn. 1885, ch. 145, s. 48.

² Laws of R. I. 1887, ch. 634, s. 1.

⁴ Rev. Stat. Me. ch. 27, s. 56.

⁶ Laws of Minn. 1885, ch. 145, s. 48.

⁸ Laws of Georgia, 1885, No. 182, s. 1.

¹⁰ Laws of Florida, 1887, ch. 3700.

¹² Laws N. C. 1887, ch. 215.

Or the right is given to towns and counties,¹ also to towns alone.²

Or to counties only, but if a majority in any township, town, or election precinct within such county vote "No," then no license may be issued therein.³

A majority of the adult inhabitants, including females, residing within three miles of any institution of learning or church may, by petition to the county court, obtain an order forbidding the sale of liquors within three miles of such building for the period of two years thereafter.⁴

Recurrence. — The frequency of these elections is variously limited. The question of license is to be submitted at each annual or general⁵ election, or in the even-numbered years.⁶

It cannot be submitted within two,⁷ or three, or four⁸ years of a decision, and the result remains in force until changed by a subsequent election.⁹ But the failure to carry prohibition in a county shall not prevent an immediate election in any justice's precinct, town, or city, on the question.¹⁰

If a "No" vote results, the existing licenses are void;¹¹ or run till their expiration, or for six months, or a reasonable time thereafter. In Texas the proportion of license fee for the unexpired time is returned.¹²

The rule in Arkansas is unique. No license may be granted in that State unless a majority of the county so votes; but if a majority in any township, town, or ward of a city in such county vote for license, it may be issued therein.¹³ Hence the Arkansas system is Prohibition with Local Option for License, instead of License with Local Option for Prohibition, as in other States.

In Tennessee it is forbidden to sell intoxicating liquors within four miles of any school-house, public or private, whether school is in session or not. But this does not apply to incorporated towns.¹⁴

Another form of Local Option is that which forbids the issuing

¹ Laws Mo. 1887, p. 179, s. 1.

² Code of N. C. 1883, s. 3117.

³ Dig. Stats. Ark. 1884, s. 4513.

⁴ Gen'l Stats. Ky. 1887, p. 470.

⁵ Laws Dak. 1887, ch. 70, s. 4.

⁶ Gen. Stats. Conn. 1888, s. 3051.

⁷ Dig. Stats. Ark. 1884, s. 4515.

⁸ Gen'l Stats. Conn. 1888, s. 3050.

⁹ Dig. Stats. Ark. 1884, ss. 4524, 4525.

¹⁰ Laws Wash. Terr. 1886, p. 31, s. 4.

¹¹ Laws Mo. 1887, p. 179, s. 7.

¹² Laws Texas, 1887, ch. 104, s. 1.

¹³ Laws Texas, 1883, ch. 106.

¹⁴ Acts Tenn. 1887, ch. 167.

of a license unless the applicant produces a petition signed by a majority of the electors of the district.¹

Still another allows such a majority in localities within three miles of a school or church to petition against the granting of license therein.²

Females, as well as males, are competent subscribers to such petition.³

LICENSE.

The statutes regulating license are mainly occupied with the conditions of obtaining a license, by whom it may be granted and revoked, and the tax or fee required of the licensee.

Who may obtain License. — The applicant must be temperate,⁴ of good moral character, over 21,⁵ a citizen of the United States.⁶ Must not have violated the liquor laws within one,⁷ two, or five⁸ years, or in his life.⁹

Must be recommended by the grand jury,¹⁰ and must not be a trial judge.¹¹

Application. — He must present a written application signed by a majority of the resident electors,¹² or by twelve citizens,¹³ or by ten *bona fide* residents, five of whom must be land-owners nearest the place proposed.¹⁴ This application must state the kind of business to be done and the building in which the saloon is to be kept,¹⁵ which must not be a State or county building,¹⁶ or a grocery¹⁷ or within four hundred feet of a public school,¹⁸ or a dwelling-house, unless communication between the dwelling portion and the place of sale is cut off;¹⁹ and there must be two good rooms for guests.²⁰

Notice and Remonstrance. — Notice of the application must be published in a weekly paper,²¹ or at the court-house, for two or more weeks. Thereupon a remonstrance may be entered by any

¹ Rev. Stats. Mo. ch. 98, s. 5442.

² Dig. Stats. Ark. 1884, s. 4525.

³ Laws of Utah, 1882, ch. 28, s. 2.

⁴ Laws of Minn. 1887, ch. 6, s. 2.

⁵ Rev. Stats. Mo. ch. 98, s. 5458.

⁶ Rev. Stats. S. C. s. 801.

⁷ Rev. Code Del. 1874, p. 261.

⁸ Gen. Stats. Conn. 1888, s. 3063.

⁹ Laws of Pa. 1887, no. 53, s. 4.

¹⁰ Gen. Stats. Conn. 1888, s. 3074.

¹¹ Pub. Stats. Mass. 1882, ch. 100, s. 6.

¹² Dig. Stats. Ark. 1884, s. 4524.

¹³ Code W. Va. 1887, ch. 32, s. 14.

¹⁴ Laws of Pa. 1887, no. 53, s. 2.

¹⁵ Laws of Minn. 1887, ch. 81, s. 4.

¹⁶ Laws of Md. 1882, ch. 46, p. 80.

¹⁷ Laws of Fla. 1883, ch. 3416, s. 2.

¹⁸ Code of Ga. 1882, par. 1419.

¹⁹ Gen. Stats. Conn. 1888, s. 3074.

²⁰ Acts of Mass. 1882, ch. 220.

²¹ Rev. Code Del. 1874, p. 261.

voter¹ interested, and the owner of adjoining real estate may object.² A time must be fixed for hearing applications and remonstrances.³ No license shall be issued without the written consent of the lessor.⁴

Bond. — Moreover, the applicant must take oath not to violate the law, and must give a bond for from \$250⁵ to \$6,000,⁶ conditioned on observance of the laws and subject to suits under the Civil Damage Act.⁷

To this bond there must be two sureties who must each take oath that they are worth the amount of the bond over all debts, and must designate property to that amount.⁸

They must not themselves be dealers in liquor, must own real property to the value of \$2,000, in the precinct, and must not have gone on any other bond.⁹

This application or petition goes before the city council,¹⁰ county commissioners,¹¹ county court,¹² or board of excise,¹³ to which the power to license, tax, regulate, or prohibit¹⁴ is given.

In some States the action of these bodies is final, in others an appeal will lie, and they may be compelled by a writ of mandamus to issue license.

In still other States they may completely withhold all licenses in their discretion.¹⁵ The body which may grant license may also revoke it for cause,¹⁶ and they may suspend it pending the examination of an affidavit of two citizens that the licensee has sold to a minor or to one intoxicated.¹⁷

Licenses are classified as manufacturing, wholesale, retail, bar-room, grocery, and drummer.¹⁸ They allow the sale of all liquors, or of beer and light wines only, and they sometimes forbid the sale of liquor to be drunk on the premises.

License Fees. — The taxes and fees on licenses are on —

¹ Rev. Stats. Ind. 1881, s. 5314.

² Laws Pa. 1887, no. 53, s. 4.

³ Rev. Stats. N. Y. p. 1979.

⁴ Rev. Stats. Ill. 1887, ch. 43, s. 5.

⁵ Laws Pa. 1887, no. 53, s. 5, 9th.

⁶ Gen. Stats. Conn. 1888, s. 3053.

⁷ Rev. Stats. N. Y. p. 1979.

⁸ Gen. Stats. Col. 1883, p. 2104, s. 9.

⁹ Laws Fla. 1883, ch. 3416, s. 5.

¹⁰ Pub. Stats. Mass. 1882, ch. 100, s. 7.

¹¹ Code Wash. Terr. 1881, s. 2060.

¹² Acts Mich. 1887, no. 313, s. 8.

¹³ Rev. Stats. N. Y. p. 1979.

¹⁴ Gen. Stats. Col. 1883, p. 2106, s. 11.

¹⁵ Dig. Stats. Ark. 1884, s. 4508.

¹⁶ Rev. Stats. Neb. 1887, ch. 50, s. 25.

¹⁷ Pol. Code Dak. 1885, ch. 35, s. 5.

¹⁸ Laws Miss. 1886, p. 16.

Light wine and beer only, from	\$25 ¹ to \$300 ²
General retailing	\$40 ³ to \$1,000 ⁴
Manufacturers	\$350 ⁵
Buffet cars and steamers	\$250 ⁶
Drummers	\$250 ⁷

In some States this is a fixed fee, in others it is a tax, graduated by the stock in trade, or by the population of the cities,⁸ or by the monthly⁹ or quarterly¹⁰ sales, which may be determined by a patent sale register.¹¹

In Wisconsin the minima are \$100 to \$200, and a Local Option vote is allowed to raise these to \$400 and \$500, respectively.¹²

Distribution of Proceeds. — An important point in practice is the distribution of the license moneys.

They are either handed over to the State and set apart for the school fund,¹³ or are divided between the State and the county,¹⁴ or between the county and the city,¹⁵ or the county and the city have separate control over the receipts. In one State they form a county road fund.¹⁶

Saloon Regulations. — It is customary, if not universal, to forbid sale to minors, to Indians, near camp meetings, on Sunday, in prison, on election day, to one intoxicated, or at agricultural fairs.

It is also usual to order saloons to be closed between the hours of 9¹⁷ or 12¹⁸ P.M. and 5¹⁹ or 7²⁰ A.M.

During the time of closing, all screens or obstructions must be removed.²¹

The adulteration of liquor, the employment of minors, and gaming in saloons, are generally forbidden, and some States forbid any screens or other obstructions to be placed between the street and the place of sale.²²

In South Carolina, one at whose saloon a riot or breach of the

¹ Laws Miss. 1886, p. 17.

⁸ Comp. Laws New Mex. § 2901.

⁵ Gen. Stats. Col. 1883, p. 630.

⁷ Laws Miss. 1886, p. 16.

⁹ Polit. Code Cal. s. 3381.

¹¹ Acts La. 1879, p. 3.

¹⁸ Code Miss. 1880, § 1099.

¹⁵ Laws Mich. 1887, no. 313, s. 9.

¹⁷ Acts Mich. 1887, no. 313, s. 17.

¹⁹ Gen. Stats. Minn. 1878, ch. 16, § 19.

²¹ Acts Mich. 1887, no. 313, s. 31.

² Pub. Acts Mich. 1887, no. 313, s. 1.

⁴ Laws Dak. 1887, ch. 71.

⁶ Code Ala. app. 1887, 629, subd. 3.

⁸ Code Ala. app. 1887, 629, subd. 2.

¹⁰ Rev. Stats. Ariz. 1887, par. 2239, tit. 42.

¹² Laws Wisc. 1885, ch. 296, s. 3.

¹⁴ Laws N. Mex. 1884, § 2901.

¹⁶ Laws Mo. 1887, p. 178.

¹⁸ Pa. Digest, 1883, p. 1081, s. 38.

²⁰ Acts Mich. 1887, no. 313, s. 17.

²² Acts Mass. 1882, ch. 259.

peace occurs, is presumed to have aided and abetted therein.¹ Elsewhere the mayor or selectmen may prohibit the sale of liquor in cases of riot or great public excitement.²

In a few States the sale of liquor in connection with any theatre³ or concert hall⁴ is forbidden; likewise, the sale within two miles of public political meetings.⁵

Penalties.—The breach of these regulations is a misdemeanor with the penalty of \$10 to \$100 fine, or ten days to three months imprisonment, or both; with increased penalties, and forfeiture of license⁶ for a second offence.

A portion of the fines may go to the informer,⁷ or to the school fund.⁸

Miscellaneous.—In some States special grocery licenses are given, in others the sale at groceries is specially prohibited.⁹

Again, sale on credit is forbidden,¹⁰ and no recovery may be had for sales of less than a quart at a time. Elsewhere, "treating" is forbidden,¹¹ and one having "treated" a voter forfeits the office to which he may have been elected.¹²

It is often provided that the public schools shall give instruction on the effects of alcoholic stimulants on the human system.¹³

It is not necessary in Ohio to allege the precise kind of liquor sold.¹⁴ "Intoxicating" includes both beer and cider.¹⁵

A judge may subpœna one found intoxicated to declare where and of whom he obtained the liquor.¹⁶

Retailers are those selling in quantities less than five gallons,¹⁷ or than one quart,¹⁸ and their licenses may be transferred if the body which has power to grant license consents.

The Ohio system is peculiar. By the constitution no license to traffic in liquors shall be granted by the State.¹⁹

By the Liquor Tax law of 1883 all persons retailing liquor are "assessed" under provisions similar to those elsewhere used to regulate licenses.²⁰

¹ Gen. Stats. S. C. 1882, s. 1740.

² Penal Code Cal., ss. 304-5.

³ Code N. C. 1883, s. 1079.

⁴ Code Miss. 1880, s. 1104.

⁵ Laws Pa. 1887, no. 53, s. 4.

⁶ Comp. Stats. Neb. 1887, ch. 50, s. 31.

⁷ Acts Mich. 1887, no. 165, s. 1.

⁸ Gen. Stats. Conn. 1888, s. 3048.

⁹ Laws of Mo. 1887, p. 217.

¹⁰ Cons. Ohio, art. 15, s. 9.

¹¹ Laws Mass. 1887, c. 365.

¹² Laws N. Y. 1887, ch. 307, § 3.

¹³ Laws Mass. 1887, c. 392.

¹⁴ Laws Io. 1884, c. 143, s. 9.

¹⁵ Code Cal. iv. p. 616.

¹⁶ Code W. Va. 1887, ch. 5, s. 10.

¹⁷ Rev. Stats. Ohio, 1886, s. 7222.

¹⁸ Acts Mich. 1887, no. 313, s. 19.

¹⁹ Rev. Stats. Mont. 1879, p. 576, s. 798.

²⁰ Oh. Laws, 1888, no. 237.

CIVIL DAMAGE ACTS.

These statutes are intended to place responsibility for the acts of intoxicated persons on the liquor seller, to give a special remedy to relatives damaged by such intoxication, and to prevent the sale of liquor to certain persons specifically named. These three purposes are sometimes embraced in one enactment, but generally appear separately. I will treat the subject as if in one enactment.

Every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person, property, or means of support, by any intoxicated person, shall have a right of action against the person who by sale or gift of liquors caused the intoxication, in whole or in part, and against his lessor, with the knowledge that the building is used for the sale of intoxicating liquors, for actual and exemplary damages.¹

Notice. — Forbidding sale to a particular person may be given either by the relatives,² by a justice of the peace,³ or by the mayor on application of the relatives; after notice, sale to such person within three months,⁴ or one year,⁵ is illegal. This notice must be given before a witness,⁶ or a general notice to all the saloon-keepers of the town may be filed with the town clerk.⁷

The town authorities may give notice not to sell to those receiving town aid,⁸ or to one likely to become a public charge;⁹ or the probate judge may send to dealers a list of intemperate persons to whom they must not sell.¹⁰

Damages. — "The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic. He shall support all paupers, widows, and orphans, and the expenses of all civil and criminal prosecutions growing out of or justly attributed to his traffic in intoxicating drinks."¹¹

Damages may be for injury or death of the person intoxicated; they may be by fine, between \$25¹² and \$500;¹³ may be assessed by the jury,¹⁴ may be recovered in case,¹⁵ tort, or trespass,¹⁶ and this right of action survives.

¹ Rev. Code N. Y. p. 1990.

² Pol. Code Dak. 1885, ch. 35, s. 4.

³ Laws Minn. 1887, ch. 81, s. 1.

⁴ Rev. Stats. Ohio, 1886, s. 4358.

⁵ Laws Wisc. 1887, ch. 288.

⁶ Comp. Stats. Neb. 1887, ch. 50, s. 15.

⁷ Gen. Laws of N. H. 1878, ch. 109, s. 28.

⁸ Acts Mich. 1887, no. 313, s. 20.

⁹ Laws of R. I., May Sess. 1886, ch. 596, s. 50.

¹⁰ Gen. Stats. Col. 1883 p. 1034, s. 5.

¹¹ Dig. Laws Pa. p. 1082, s. 46.

¹² Rev. Stats. Ohio, 1886, s. 4358.

¹³ Gen. Stats. Conn. 1888, s. 3089.

¹⁴ Laws Wash. Terr. 1886, p. 160.

¹⁵ Code of N. C. 1883, s. 1078.

¹⁶ Gen. Laws N. H. 1878, ch. 109, s. 33.

If such intoxicated person be imprisoned for such intoxication, or for acts resulting therefrom, his wife or minor children may recover \$2 per diem for every day of such imprisonment from the person in whole or in part causing such intoxication.¹

The mayor or any one of the selectmen may give notice and sue in his own name for the benefit of the relatives.² Married women and minors may recover in their own name and for their own benefit.

A relative may recover \$5 from the vendor allowing one to become drunk on the premises.³

The lessor and the sureties⁴ may be liable as above.

One taking care of a person found intoxicated may recover his reasonable expenses,⁵ and \$2⁶ or \$5⁷ per day besides.

The evidence need only show that the sale was made on the day or about the time when the intoxication occurred, and proof of a single sale during such period will entitle a relative to recover;⁸ and it is sufficient if such intoxication be caused in whole or in part by the defendant.⁹

CONSTITUTIONAL PROVISIONS.

Fifteen States refer to this subject in their constitutions, namely, Alabama, Colorado, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Maine, Mississippi, Nebraska, Ohio, Rhode Island, Texas, West Virginia.

Some declare that the legislature or county supervisors may regulate and prohibit¹⁰ by license tax,¹¹ or otherwise; and the proceeds of license taxes go to the school fund of the State¹² or the division where they accrued.¹³

Elsewhere, sale on Election-day or near the polls is forbidden.¹⁴

In two States — Florida and Texas — Local Option is enjoined,¹⁵ and in four — Iowa, Kansas, Maine, Rhode Island — the traffic is prohibited,¹⁶ except for medical, mechanical, or scientific purposes.

Adulteration of liquor is forbidden in Colorado.¹⁷

¹ Laws of Vt. 1886, no. 26.

² Acts Mass. 1885, ch. 282, s. 2.

³ Dig. Laws Pa. p. 1083, s. 57.

⁴ Acts Mich. 1887, no. 313, s. 20.

⁵ Pol. Code Dak. 1885, ch. 35, s. 8.

⁶ Rev. Stats. Illinois, 1887, s. 16.

⁷ Comp. Laws Kansas, 1885, s. 2300.

⁸ Comp. Stats. Neb. 1887, ch. 50, s. 18.

⁹ Laws R. I., May Sess., 1886, pp. 2-20, s. 48.

¹⁰ Cons. W. Va. art. 6, s. 46.

¹¹ Cons. Illinois, art. 9, s. 1.

¹² Cons. Ga. art. 8, s. 3.

¹³ Cons. Neb. art. 8, s. 5.

¹⁴ Cons. Ga. art. 8, s. 6.

¹⁵ Cons. Fla. art. 19, § 10.

¹⁶ Cons. Kansas, art. 15.

¹⁷ Cons. Col. art. 18, s. 5

Prohibition States. — Iowa, Kansas, Maine, New Hampshire, Rhode Island, Vermont, — 6.

Local Option States and Territories. — Arkansas, Connecticut, Dakota Territory, Florida, Georgia, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Montana Territory, North Carolina, Ohio, South Carolina, Texas, Virginia, Washington Territory, — 17.

License, \$500, or over. — Arkansas, Dakota Territory, Illinois, Michigan, Minnesota, Missouri, Nebraska, Pennsylvania, Montana Territory, Washington Territory, — 10.

Those who are interested in the exact wording of Local Option and License laws will be well repaid by an examination of the Acts of Mich. 1887, nos. 197 and 313, and the criticism of Champlain, J., on Act no. 197, in *In Re Hauck*, 38 N. W. Rep. 269. The Local Option Act is declared unconstitutional for a variance between the title and the act.

Most of the questions of law arising under the foregoing body of legislation are ably treated in an article by W. L. Murfree, Sen., in 7 Crim. Law Mag. p. 137.

If the question arise whether these laws conflict with the Federal Constitution it would seem, by the late decision of the Supreme Court in the case of *Nugler v. Kansas*, 8 Sup. Ct. Rep. 273, that the States, in the exercise of their police power, may regulate and prohibit the sale of liquor in any way which does not interfere with interstate commerce, or with the U. S. revenue laws.

REFERENCE NOTES.

Alabama. — Const. art. 8, § 6; License, Code '86, ss. 1319-1323.

Arkansas. — Local Option, Dig. Stats. Ark. '84, s. 4513; License, \$700, Dig. Stats. Ark. '84, s. 4510; 3 Mile Law, Dig. Stats. Ark. '84, s. 4524.

Arizona. — License, by sales, \$40-\$500; Revised Stats. Ariz. '87, par. 2239.

California. — License, \$60 to \$480, by sales, Pol. Code Cal. s. 3381.

Colorado. — Const. art. 18, s. 5; License, \$25 to \$300, Gen. Stats. Col. p. 2103, s. 8; Civil Damage, after notice, Gen. Stats. Col. p. 1034, s. 5.

Connecticut. — Local Option by Towns, Gen. Stats. Conn. '88, s. 3050; License, General, \$100, ale, etc., \$50, Gen. Stats. Conn. '88, ss. 3053-3080.

Dakota. — Local Option, Laws Dak. '87, c. 70; License, \$500-\$1,000, Laws Dak. '87, c. 71; Civil Damage after notice, Polit. Code D. '85, c. 35, § 4.

Delaware. — License, Rev. Code Del. '74, p. 259; Civil Damage Laws, Del. '81, c. 384, s. 14; Acts Del. '87, p. 153.

Florida. — Const. art. 19, Local Option; Local Option, Laws of '87, p. 42, ch. 3700; License State Tax, \$400; counties, etc., may impose fifty per cent. additional, Laws of '87, ch. 3681, s. 9.

Georgia.—Const. art. 2, s. 5; art. 8, s. 3; Local Option, Laws '85, no. 182; License Code '82, § 1419; State Tax, §50.

Idaho.—License, \$60 to \$200, territorial tax; county tax by monthly sales, \$60 to \$100, Rev. Stats. Idaho '87, ss. 1648-9.

Indiana.—License, General, \$100, vinous and malt, \$50, Rev. Stat. Ind. '81, s. 5316. Incorporated towns may add as much more, Acts Ind. '85, p. 172.

Illinois.—Const. art. 9, s. 1; Local Option by petition, Rev. Stats. Ill. '87, ch. 43, s. 17; License, General, \$500, malt, \$150, Rev. Stats. Illinois '87, s. 16; Civil Damage, Rev. Stats. Illinois '87, s. 9.

Iowa.—Const. art. 1, s. 26, Prohibition; Prohibition, Laws '84, ch. 143; Nuisance, Laws '86, pp. 81-5; Permits, Rev. Code '80, p. 406 *et seq.*; Civil Damage, Rev. Code '80, s. 1557.

Kansas.—Const. art. 15, § 10, Prohibition; Prohibition, Comp. Laws '85, c. 35, s. 2287; Nuisance, Comp. Laws, s. 2299; Civil Damage, Comp. Laws, s. 2301; Nuisance, Laws '87, p. 233.

Kentucky.—Local Option, Gen. Stats. '87, p. 470; License, Gen. Stats. '87, p. 1047; Civil Damage, after notice, Gen. Stats. '87, p. 1235.

Louisiana.—Const. arts. 170, 190, 206; Local Option Laws of La. '84, p. 98; License, by sales, \$50-\$750, Laws '86, p. 181.

Maine.—Const. am'dmt, Acts '85, p. 339, Prohibition; Prohibition, Rev. Stats. ch. 27; Nuisance, Rev. Stats. ch. 27; Civil Damage, Rev. Stats. ch. 27; Town Agents.

Maryland.—License, by stock in trade, \$35-\$150; Rev. Code Md. '78, art. 12, ss. 60-70.

Massachusetts.—Local Option, Pub. Stats. ch. 100, s. 5; License, \$150 to \$1,000. Acts Mass. 1888, ch. 341; Druggists, Stats. '87, ch. 431; Civil Damage Stats. '85, ch. 282; Nuisance, Pub. Stats. ch. 101.

Michigan.—License, \$300-\$500, Acts '87, no. 313; Civil Damage, Acts '87, no. 313.

Minnesota.—Local Option, Laws '85, ch. 145, s. 48; License, \$500 to \$1,000, Laws '87, ch. 5; Civil Damage, after notice, Laws '87, ch. 81.

Mississippi.—Const. art. 8, s. 6, 2d amendment: Local Option, by petition, Code of '80, § 1103; License, General, \$200-\$1,000, Code of '80, § 1099.

Missouri.—Local Option, Laws '87, p. 179; Civil Damage for sale to a minor, Laws '85, p. 160; License, \$550 to \$1,200, Laws '87, p. 179.

Montana Territory.—License, \$180 to \$500, by population; Extra sess. '87, p. 74; Local Option, Gen. Stats. '87, p. 1035.

Nebraska.—Const. art. 8, s. 5, art. 9, s. 1; License, \$500 to \$1,000, by population; Comp. Stats. Neb. '87, ch. 50; Civil Damage, Comp. Stats. Neb. '87, ch. 50, s. 15.

Nevada.—License, \$60 to \$120, Rev. Stats. Nev. § 1140.

New Hampshire.—Prohibition; Nuisance, Laws '87, ch. 77; Civil Damage, Gen. Laws N. H. '78, ch. 109, s. 28; Town Agents, Gen. Laws N. H. '78, ch. 109, s. 1.

New Jersey.—Local Option, License, \$100 to \$250, Laws '88, ch. 110.

New Mexico.—License, \$40, Comp. Laws '84, §§ 1622, 2901; Civil Damage, after notice, Laws '87, p. 45.

New York.—License, Laws '86, ch. 496, § 1; License, \$30 to \$250, Rev. Code N. Y.; Civil Damage, Rev. Code, p. 1990.

North Carolina.—Local Option, Laws '87, ch. 215; License, \$80, Laws '87, pp. 249, 255; Civil Damage, Code, '83, s. 1078.

Ohio.—Const. art. 15, s. 9; Assessment, \$200, supp. Rev. Stats. pp. 686-8; Civil Damage, after notice, Rev. Stats. s. 4357.

Oregon.—Local Option by petition, Hill's Laws of Oregon, § 3635; License, Oregon, ch. 54, tit. 1.

Pennsylvania.—License, \$100 to \$500, by population, Laws of '87, no. 135; License, in General, Laws of '87, no. 53; Civil Damage, Pa. Digest, p. 1082.

South Carolina.—Local Option, Gen. Stats. S. C. '82, ss. 1746-53, amd. in Acts

'83, p. 384; License, \$75, Gen. Stats. s. 1736; Civil Damage, after notice, Gen. Stats. s. 1738.

Rhode Island. — Const. art. 5, Prohibition; Prohibition, Laws of '87, ch. 634, s. 1; Nuisance, Laws of '87, ch. 634, s. 14; Civil Damage, Laws of '86, p. 2, s. 48.

Tennessee. — License, \$150 to \$200, by population, Acts of Tenn. '87, p. 15; License, in general, Code Tenn. p. 172.

Texas. — Const. art. 16, s. 20; Local Option, Laws of '87, p. 96; License, General, \$300; malt, \$50; Laws '81, p. 21.

Utah. — License, \$100 to \$1,200, Laws of '82, ch. 28; Civil Damage, Laws of '82, ch. 28.

Virginia. — Local Option, Code '87, s. 581; License, \$75 to \$125, and 15% on the rental value of the bar-room; License, Wholesale, \$350, Acts of '84, p. 604.

Vermont. — Prohibition, Laws '82, no. 41; Civil Damage, Laws '86, p. 30; Nuisance, Rev. Stats. ss. 3834-45; In general, Rev. Stats. ch. 169.

Washington Territory. — Local Option, Laws '86, p. 31; Civil Damage, Code '81, s. 2059; License, \$300 to \$1,000; Laws '87, p. 124.

West Virginia. — Const. art. 6, § 46; License, \$150-\$350, Code of '87, p. 248; Wholesale, \$350, Code of '87, p. 248; Civil Damage, Code of '87, p. 237.

Wisconsin. — Local Option for high license, Laws '85, ch. 296; License, \$100 to \$200, by population, Laws '85, ch. 296; Civil Damage, Rev. Stats. s. 1560; Spendthrift Act, Laws '87, ch. 288.

Wyoming Territory. — License, \$100 to \$500, by distance from a railroad, Rev. Stats. Wyo. ss. 1442, 1453.

Wm. Church Osborn.

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In this number we publish the first part of an essay by Mr. SAMUEL WILLISTON, which gained the prize offered last year by the Harvard Law School Association. This prize bids fair to become an annual affair, at least for several years to come, for at the last dinner of the Association Mr. Charles C. Beaman very generously promised one hundred dollars a year for five years to be thus expended. In another way, also, the benefits of the Association have become apparent. This year, for the first time, the course in Constitutional Law has been raised to a full course, two hours a week throughout the academic year. It is thus needless to point out the practical usefulness of the Association. Although it contains already over eight hundred of the past members of the School, its numbers ought to be still further increased, for an organization of this kind, composed of men who are familiar with the methods of the School, and have a sincere appreciation of them, cannot fail to have a strong influence on the School, and through it on legal education generally.

We have received the circulars which the secretaries of the two classes that were last graduated from the School have just issued. These classes organized at the suggestion of the secretary of the Harvard Law School Association, and the circulars are appeals for aid in furtherance of the purpose to keep some record of the members of our School. All who have ever been connected with either class belong, *ipso facto*, to the class organization. The duty of the secretary is to collect information about the members and to issue periodical reports, giving the address of each man and containing a short account of his career. All members are urged to keep in communication with their secretary, giving him such information about themselves as would be interesting to their class. The addresses of the secretaries are as follows: Joseph Henry Beale, 5 Tremont Street, Boston; Bancroft Gherardi Davis, 23 Court Street, Boston.

THE case of *The Bernina* (under the name of *Mills v. Armstrong*, 57 L. J. Rep. Q. B. 65) has now been finally settled by a unanimous decision of the House of Lords affirming the decision of the Court of Appeal made last year. The case was originally assigned to Mr. Justice Butt (11 P. D. 31), whose division of the court generally administered admiralty law, who, however, held that the case should be decided on common-law principles. The action was to recover under Lord Campbell's Act for loss of life in a collision at sea, brought about by the fault of both vessels, whereby an engineer and passenger on one of them, who were not at all responsible for the accident, were drowned. The question was, whether negligence should be imputed to them so as to bar an action by their representatives. On the authority of *Thorogood v. Bryan*, 8 C. B. 115, Mr. Justice Butt held the action barred. The Court of Appeal, 12 P. Div. 58, reversed the decision, thus overruling *Thorogood v. Bryan*. There was some curiosity to see how the House of Lords would treat the case when it came before them, since Lord Bramwell had, as Baron Bramwell, in times gone by, let fall observations in support of *Thorogood v. Bryan*. He did not shrink, however, from the issue, pronouncing an unequivocal judgment against the proposition for which that case is cited, which is, that a passenger has imputed to him the negligence of the driver of the vehicle in which he is. Lord Bramwell remarked, however, that he thought that *Thorogood v. Bryan* was decided correctly upon the pleadings.

A CASE of much interest (*Bond v. Kilvery*) was decided last spring in Chicago by Judge Tuley, of the Circuit Court of Cook County, who furnished the "Chicago Legal News," of May 19, with an abstract of his oral opinion, from which the following selections are made:—

"One James Washington was a slave of Col. Thomas Marshall, in Kentucky. He cohabited with a slave woman on a neighboring plantation, whom he called his wife, and they were known as husband and wife, after the custom of slave unions. No marriage ceremony of any kind was ever performed. The result of the cohabitation was one child, the deceased testatrix, who died without issue. In 1832 the father escaped from slavery, went to Ohio, where he married another wife, the slave woman being dead. The facts shown raise the single question, whether or not there could be a common-law marriage between slaves by the slavery laws of Kentucky, as they existed prior to 1832.

"As I understand the law applicable to persons so held in slavery, they could not enter into any legal contract, not even that of marriage. The common law regards marriage as a civil contract. In some of the States the slaves were classed as chattels, and in others as chattels real. Being without legal capacity to contract, there could be no such thing as a common-law marriage between slaves."

Judge Albion W. Tourgee has criticised this view in the "Inter-Ocean," of May 15. He says that "it is not so certain that the law will not hold this relation between slaves, for the purpose of inheritance, to have been the equivalent of a common-law marriage between whites"; and he doubts whether a State has a right to say that a man shall not marry and have heirs.

A VERY interesting discussion has been running through the late numbers of the "American Law Register," on the relation of law schools

to legal education. Mr. Henry Budd began it in the February number of this year. He accused the schools of being instrumental in shortening the time necessary for preparation for the bar, and, more than that, of failing to give the thorough mental training and the ability to handle legal questions which, he maintains, used to be obtained under the old system of apprenticeship in a lawyer's office. To this attack Prof. H. W. Rogers, of the Michigan University Law School, replied in the June number, and was in turn met by another article from Mr. Budd in July. Rather aside from this discussion, but suggested by it, is a good description, also in the July number, of the case system of instruction as used in this school, written by Mr. Sidney G. Fisher.

Sure and rapid progress in legal thought can come only when lawyers enter the bar with trained minds, with a broad knowledge of law as a science, and with the highest ideals as to their duties. Therefore it behooves all who enter the profession to point out the way, so far as they can, by which this result shall be attained. Among the many experiments that have been made in this field, that of the Harvard Law School is certainly not the least important; but it is very disappointing to see the ignorance which prevails among lawyers as to the scope and success of that experiment. Thus Mr. Budd says that "ordinary law schools" give "only sixteen months of actual instruction" and have no requirements for entrance. To be sure, he says that "there may be exceptions to the rule"; but he seems to imply that he knows of none. The Harvard School, however, ever since 1877 has required all candidates for a degree who are not college graduates to pass examinations in Latin and in "Blackstone's Commentaries," insisting that the papers be written with correct spelling, punctuation, grammar, and expression, and has lengthened the course to three years. Still more discouraging is the ignorance of our methods of study, such as was displayed by even so eminent a writer as Mr. Joel Prentiss Bishop in the January-February number of the "American Law Review."

The difference between the lecture system of instruction and the case system lies, not in the presence or absence of text-books or reports from the student's working library, as Mr. Bishop implies, but in the use to which the books are applied. In the lecture system, the teacher prepares his lectures by original investigation, making his own analyses of the cases. The result of his studies he gives to his hearers in such form as he thinks best, referring to the cases as authorities. It is safe to say that in nine cases out of ten the cases are not looked up by the student, so that his only effort is that of trying to understand and remember what he has heard. Of course that effort is considerable; but still from it the student has not received the benefit that his teacher received from the preliminary studies, because he has not had the intellectual exercise of extracting principles from cases and then stating them. In the case system, the cases are given out before the lecture. The student is then required to state them to the professor, indicating at the same time whether or not he agrees with the decision. Class discussion ensues, guided and controlled by the teacher. By this method the great principles of the common law are extracted from the authorities, not by the professor for the student, but by the student for himself under the guidance of the professor. Thus is ensured a regular and orderly study, which for the student has all the freshness and exhilaration of original investigation. Indeed, it

requires great care on the part of the professor to prevent the students in their eagerness from carrying the discussion into too great detail, and so from wandering from the main points. To the value of such a training all will bear witness who have ever experienced it. Not the least advantage of such a system are the pleasant and cordial relations established between teacher and pupil.

The Harvard Law School is no longer an experiment,—it is an assured success, and its methods deserve to be carefully studied by all who have the cause of legal education at heart.

THE LAW SCHOOL.

CLUB COURTS.

SUPERIOR COURT OF THE AMES-GRAY.

Grain Elevator Cases. — Doctrine of Tenancy in Common in Sales from a Bulk. — Intention.

A warehouseman being the owner of wheat in bulk sold a portion, giving the buyer a sold note and a warehouse receipt. The buyer having become insolvent before any appropriation of the wheat was made, the warehouseman refused to deliver on the application of the buyer's assignee. — *Trover*.

The intention of the parties at the time of the making of the bargain was clearly that a property in the flour should pass. This was evidenced by the giving of the warehouse receipt, and by the payment thereunder of warehouse dues. If we follow the English law, which holds that separation is necessary in order that there should be any sale, we necessarily defeat this intention; and where, as in a case like the present, there can be no advantage from the privilege of separation or selection, it does not seem that such a rule should be applied.

It conforms as nearly as may be with the intention of the parties to say that the buyer, in such a case as this, purchases a proportionate interest in the whole bulk, and that he thereby becomes a tenant in common with the seller. It has, however, been strenuously objected to the application of this doctrine that the parties did not intend to become tenants in common when they entered into the contract. It is true they may not have had this exact intention, but they certainly did intend that the flour should belong to the buyer. The prime thing for the law to look at is the intention of the parties in regard to the ultimate result of the transaction, and not what they may have intended to be the means of reaching that result. If the ultimate result can only be reached by one legal method, it would seem better that the courts should not concern themselves with the question whether or not the parties intended that that method should be employed.¹ *Judgment for the plaintiff.*²

¹ *Chapman v. Shepard*, 39 Conn. 413, 425.

² The earliest cases in which this doctrine of tenancy in common was applied were *Kimberly v. Patchin*, 19 N.Y. 330, and *Pleasants v. Pendleton*, 6 Rand. (Va.) 473. Among the recent cases following *Kimberly v. Patchin* are *Newhall v. Langdon*, 39 O. St. 87; *Gray v. Holland*, 37 Ark. 483; *Phillips v. Moor*, 71 Me. 78; *Russell v. Carrington*, 42 N.Y. 118; *Chapman v. Shepard*, 39 Conn. 413; *Watt v. Hendry*, 13 Fla. 523; *Smith v. Friend*, 15 Cal. 124; *Hurff v. Hires*, 40 N. J. L. 581; *Bank v. Hibbard*, 48 Mich. 118; *Hoffman v. King*, 53 Wis. 314; *Grimes v. Cannell*, 36 N.W. Rep. 470 (Neb.). Some recent cases are, however, *contra*: 90 Ind. 268; 64 Tex. 218; 59 N.H. 487; 14 Bush (Ky.), 555; 42 Ala. 484; 51 Pa. St. 66; and 11 Iowa, 32.

See "Grain Elevators," 6 Am. Law Rev. 450.

RECENT CASES.

COMMON CARRIERS OF PASSENGERS — DUTY TO PROVIDE SEATS — RIGHT OF PASSENGER TO REFUSE TO PAY FARE.— A person who has entered a train with the intention of paying his fare has a right to refuse payment unless a seat be provided him. Not being a trespasser he can be put off only at some regular station. He could, however, become a trespasser "by refusing to leave the train on a reasonable opportunity being afforded." *Hardenbergh v. St. Paul M. & M. Ry. Co.*, 38 N. W. Rep. 625 (Minn.).

CONSTITUTIONAL LAW — CLASS LEGISLATION.— Pub. Acts Mich. 1885, p. 356, authorizing an attorney's fee of \$25 to be taxed against a railroad company in case of judgment against it in an action for injuries to stock, on account of its failure to fence its track as required by the act, is unconstitutional and void, as being an attempt to create special advantages to one class at the expense and to the detriment of another. *Lafferty v. Chicago & W. M. Ry. Co.*, 38 N. W. Rep. 660 (Mich.). See also *Wilder v. Railway Co.*, 38 N. W. Rep. 289.

CONSTITUTIONAL LAW — CRIMINAL TRIAL — ELEVEN JURORS.— A defendant in a criminal action may, when permitted by the court, the State not objecting, consent to try his case before eleven jurors, and such trial is not unconstitutional. *State v. Sackett et al.*, 38 N. W. Rep. 773 (Minn.).

The court put the case upon the same ground as the waiver of the right to be tried by unprejudiced jurors, both being "in some degree" questions of jurisdiction.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — TAKING PROPERTY WITHOUT COMPENSATION — OLEOMARGARINE ACT.— An act providing that no person shall manufacture or sell any substance designed to take the place of butter or cheese made from pure milk or cream, declaring void all contracts made in violation of it, subjecting the offender to a penalty and to a criminal prosecution, is held to be a valid exercise of the police power of the State for the protection of the public health, not depriving any one of the rights of liberty or property without due process of law, nor of the equal protection of the laws guaranteed by the fourteenth amendment of the Federal Constitution, nor in conflict with the fourteenth amendment on the ground that it deprives the citizen, without compensation, of his property acquired prior to its passage. *Powell v. Com. of Pennsylvania*, 8 Sup. Ct. Rep. 992.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TAX ON TELEGRAPH COMPANIES — PARTIAL VALIDITY.— A single tax, assessed under the laws of a State upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross, without apportionment, is invalid only as to that portion assessed on receipts from interstate commerce, being to this extent an unconstitutional regulation of such commerce. *Ratterman v. West. Union Tel. Co.*, 8 Sup. Ct. Rep. 1127.

Compare the following apparently conflicting case: Where a large part of the business of a telegraph company consists in transmitting messages between different States, no State within which it establishes an office can impose upon it a license tax based upon its gross receipts, such tax affecting the entire business of the company, interstate as well as domestic, and being an unconstitutional regulation of interstate commerce. *Leloup v. Port of Mobile*, 8 Sup. Ct. Rep. 1380.

CONSTITUTIONAL LAW — STATUTE PROHIBITING GIFTS WITH SALES OF FOOD.— By a statute in New York it is made a misdemeanor for any person who sells food to give away therewith, as part of the transaction of sale, any other thing as a premium, gift, prize, or reward. Held, to be unconstitutional, because an undue restraint of a person's liberty to follow a lawful industrial pursuit not injurious to the community. The statute is not a valid exercise of the police power, because it has no reference to the comfort, the safety, or the welfare of society; nor is it, for the same reason, a proper exercise of the power to declare what shall be a crime. The case differs from that of *Powell v. Com.*, 8 Sup. Ct. Rep. 992, in which a Pennsylvania statute prohibiting the manufacture and sale of oleomar-

garine was sustained, because it was there claimed that there was such danger to the health of the community from the use of improper ingredients as to justify absolute prohibition of the manufacture. A similar statute in New York was condemned in *People v. Marx*, 99 N. Y. 377. *People v. Gillson*, 17 N. E. Rep. 343 (N. Y.).

CONTRIBUTORY NEGLIGENCE — DAMAGES. — Defendant obstructed plaintiff's drain, which the latter could have repaired for \$25, but by delaying to repair the damages amounted to \$100. *Held*, that plaintiff could only recover \$25. *Lloyd v. Lloyd*, 13 Atl. Rep. 638 (Vt.).

This case is a curious illustration of the celebrated case of *Davies v. Mann*, 10 M. & W. 546.

CORPORATIONS — "COMBINATION" — PARTNERSHIP — ULTRA VIRES. — An agreement entered into by a number of corporations engaged in manufacturing, to select a committee composed of representatives from each corporation, and to turn over to such committee the entire control of the properties and machinery of each corporation, the profits and losses to be shared in agreed proportions, and this arrangement to last for a specified time, is a contract of partnership.

A corporation has no implied power to enter into such a contract of partnership with other corporations, and unless this power is expressly conferred by the act under which the company is incorporated, such contract, whether made by the directors or by all the stockholders, is *ultra vires*, and void so far as unexecuted. *Mallory v. Hananer Oil-Works*, 8 S. W. Rep. 396 (Tenn.).

This case is of great importance, offering, as it does, a method for the restraint, by existing judicial machinery, of the most serious form of those mysterious combinations known as "trusts," which have been believed to be "unchecked by legal restraints or safeguards." This is accomplished without recourse to special legislation as has hitherto been deemed necessary. The doctrine of this case goes further than the control of "trusts"; it deals a death-blow to the most dangerous class, — combinations between corporations.

The case, it is to be observed, does not proceed on the theory of restraining a conspiracy against the public welfare, but goes directly to the essence of the powers inherent in a corporation, and the limitations thereupon.

EQUITY PLEADING — LAPSE OF TIME — DEMURRER. — Where a bill shows upon its face that plaintiff, by reason of lapse of time and his own laches, is not entitled to relief, the objection may be taken by demurrer. *Horsford v. Gudger*, 35 Fed. Rep. 388 (N. C.).

Whether such a doctrine is sound is open to serious doubt, as its application must deprive the plaintiff of his right to apply. *Langdell on Equity Pleading*, § 129.

EVIDENCE — BOOK ENTRIES. — Where a clerk testified that he weighed the wheat taken in at his employer's elevator, and set down the correct weight in the "scale-book," from which tickets were torn off and given to the farmers, and that from the stubs he correctly transcribed the weights into the day-book, the scale-book being lost, such day-book is admissible in evidence to prove the amount of such weight. But where the clerk testifies that, after weighing the grain and entering the weight in the scale-books, his course of business was to make out invoices from these stubs, and send copies daily to his employer at another place, who entered the same in his day-book, and the clerk does not testify that he entered the weights correctly or made a correct report thereof, the scale-books being lost, the employer's day-book is not admissible in evidence to prove the amount of the weights. *Missouri Pac. Ry. Co. v. Johnson*, 7 S. W. Rep. 838 (Tex.).

EVIDENCE — CRIMINAL LAW — ADMISSIBILITY OF FORMER CRIMES TO SHOW MOTIVE. — The defendant was indicted for murder of her sister's husband by poisoning. It could be proved that there was an insurance upon his life of \$2,000, payable to his wife, the defendant's sister; that the sister died; that the defendant was appointed beneficiary under the policy; and that soon afterwards the husband died of poison. Evidence that the sister also was poisoned by the defendant was admitted, on the ground that the murder of both the sister and her husband were parts of one plan, the motive of which was to get the insurance. But it was held that evidence of the earlier crime could be admitted only after some proof of the plan has been offered. Just how much is necessary the court does not say, but makes the general statement that, while proof beyond a rea-

sonable doubt is not required, still enough must be shown "to make it proper to submit the whole evidence to the jury." *Commonwealth v. Robinson*, 16 N. E. Rep. 452 (Mass.).

See the note on *Sharp's case*, 2 HARV. L. REV. 98.

FACTORS AND BROKERS — REAL-ESTATE BROKERS — RIGHT TO COMMISSIONS. — Plaintiff, a real-estate broker, agreed to procure a purchaser for certain land of defendant at a price named, for which he was to receive a certain commission. He found such purchaser, and a written agreement was signed by both defendant and the proposed purchaser, by which the latter was to take the land at the price named, and was to have time to examine the title and reject the same if unsatisfactory. Within the time fixed, the purchaser made a groundless objection to the title, which was in fact good, and refused to take the land; but defendant did not sue for specific performance. *Held*, that plaintiff was entitled to the full amount of his commission. *Parker v. Walker*, 8 S. W. Rep. 391 (Tenn.).

If plaintiff had neglected to bind the purchaser by a contract which defendant could enforce under the statute of frauds, he could not have recovered. *Gilchrist v. Clarke*, 8 S. W. Rep. 572 (Tenn.).

LARCENY — CONSENT. — A detective pretended to be drunk and asleep, in order to secure evidence against any one who should attempt to rob him. He therefore made no resistance when the defendant, whom he did not suspect, took money from him. *Held*, that the defendant was guilty of larceny in spite of the detective's seeming consent. *People v. Hanselman*, 18 Pac. Rep. 425 (Cal.).

It is to be noted in this case that probably the detective did not intend to pass the title to, nor yet to make the defendant a bailee of, the money taken. If that is so, the decision seems to be right.

NUISANCE — MALICIOUS OBSTRUCTION OF LIGHT AND AIR. — A fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, is a nuisance. *Campbell, C. J., and Champlin, J., dissenting.* Full collection and discussion of authorities for and against the proposition. *Burke v. Smith*, 37 N. W. Rep. 838 (Mich.).

For a discussion of the general principle involved see "The Principle of Lumley v. Gye," etc., 2 HARV. L. REV. 19.

PARTNERSHIP — AGENT — PROFITS AS SALARY. — A person who employs another as his agent in a particular business, and agrees to give him a part of the net profits thereof as a salary, does not thereby make him his partner. *Missouri Pac. Ry. Co. v. Johnson*, 7 S. W. Rep. 838 (Tex.). A note collects cases.

POST-OFFICE — DECOY LETTER — LARCENY FROM MAILS. — A letter with a fictitious address, which, therefore, cannot be delivered, is not "intended to be conveyed by mail" within the meaning of the statute, and an indictment charging embezzlement of such letter will not be sustained. *United States v. Denicke*, 35 Fed. Rep. 407 (G.a.).

PRIVILEGED COMMUNICATIONS — LIBEL. — Statements made in a petition by a receiver against his co-receiver, that such co-receiver was unlawfully withholding a portion of the assets, and was obstructing their collection, and that he had embezzled some of the trust money, are not actionable, even though they are malicious and false; such statements being made in the course of a judicial proceeding. *Bartlett v. Christilf*, 14 Atl. Rep. 518 (Md.).

PRIVILEGED COMMUNICATION — SLANDER. — Slanderous words spoken by counsel in the trial of a cause are actionable, unless they relate to the cause on trial or to some subject-matter involved therein. (Two judges dissenting.) *Maulsby v. Reifsnider*, 14 Atl. Rep. 505 (Md.).

PROMISSORY NOTE — COLLATERAL PROMISE — NEGOTIABILITY. — A contract to pay money "with exchange on New York" is not a negotiable note. *Savings Bank v. Strother*, 6 S. E. Rep. 313 (S. C.).

This decision is due to a misunderstanding of the word "certainty," which in this connection means, not mathematical, but rather mercantile, certainty. Thus a promise to pay attorney's fees, while rendering the total sum to be paid uncertain, is a device to render more certain the face value of the note, and it would be so understood by business men. This view is held in *Sperry v. Horr*, 32 Ia. 184. *Contra* the principal case see *Johnson v. Frisbee*, 15 Mich. 286, and, generally, 2 Ames on Bills and Notes, 830.

PURCHASE FOR VALUE WITHOUT NOTICE.—The plea of purchase for value without notice is no defence to a legal claim for dower. *Mitchell v. Farrish*, 14 Atl. Rep. 712 (Md.).

For a collection of cases where the plea of purchase for value has not been allowed, see an article by Professor Ames, "Purchase for Value without Notice," 1 HARV. L. REV. 13.

RAPE—CONSENT OF CHILD UNDER TEN.—On a trial for rape, when the indictment alleges that the act was done "forcibly and against the will" of the prosecutrix, the court errs in charging that if the prosecutrix be under ten years old, then the defendant is guilty, whether she consented or not. *State v. Johnson*, 6 S. E. Rep. 61 (N. C.).

TRADE SECRETS—WITNESS—PRIVILEGE.—A witness for plaintiff testified on direct examination as to the uses and effects of "Moxie" or "Moxie Nerve Food." Held, that on cross-examination witness could not be required to disclose the particular ingredients of that preparation, that being a trade secret, the disclosure of which would injure plaintiff's business. *Moxie Nerve Food Co. v. Beach*, 35 Fed. Rep. 465 (Mass.).

TELEGRAPH COMPANIES—NEGLIGENCE—DAMAGES FOR MENTAL SUFFERING.—By the Tenn. Code telegraph companies are "liable in damages to the party aggrieved" by an unreasonable delay in the transmission or delivery of messages." In an action against a telegraph company, plaintiff alleged that through unreasonable delay in the delivery of a message she was unable to reach her brother before his death. Held, that the mental suffering thereby caused to plaintiff was of itself a sufficient ground for the recovery of damages. *Wadsworth v. Western Union Tel. Co.*, 8 S. W. Rep. 574 (Tenn.).

There was an able dissenting opinion. The same doctrine has, however, been upheld in Texas. *Stuart v. Tel. Co.*, 66 Tex. 580.

TRESPASS—USING ONE'S PREMISES TO THE INJURY OF ANOTHER.—The defendant occupied rooms over the plaintiff's store, and, while she was scrubbing her floors, dirty water leaked through and injured his goods, though it appeared that the defendant used proper care. The plaintiff gave her notice to stop; but she refused, and asked him to move his goods. There was no evidence that either of them had any interest in the premises beyond mere possession. Held, that there was no duty in the plaintiff to repair the floor, and that he could recover. *Patton v. McCants*, 6 S. E. Rep. 849 (S. C.).

TRUSTS—CHARITABLE USES.—A testator gave all the residue of his estate to his executors, "to be by them applied for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of my soul, and the souls of my family, and also the souls of all others who may be in purgatory." Held, that no valid trust was created. The trust, if any, must stand on the same footing as charitable trusts in England. It is no objection that the trust is superstitious, and therefore void, as in the English law, because in this country, under the State and national constitutions, religious beliefs and forms of worship are free so long as the public peace is not disturbed, and no court may say what is and what is not superstitious. But no trust is good in New York unless the ordinary elements of a trust are present. There must be a defined and ascertained beneficiary; therefore a charitable trust is invalid. *Holland v. Alcock*, 16 N. E. Rep. 305 (N. Y.).

The court say that it was formerly supposed that charitable trusts were created by the statutes of 39 Eliz. c. 5, and 43 Eliz. c. 4, although it has been since discovered that such trusts were previously enforced by chancery. Such was the view when all British legislation relating to the subject was repealed in New York, with the purpose of destroying charitable trusts, and they have, therefore, ceased to exist. Undoubtedly the courts have been influenced by the fact that corporations may be formed under a New York statute for the express purpose of receiving funds to be devoted to charitable purposes, and consequently there is little necessity for charitable trusts. See, for an excellent article on charitable bequests, 27 Am. L. Reg. 213.

TRUSTS—CHARITABLE USES—PUBLIC POLICY.—The courts will not enforce a bequest for the distribution of books in which the author describes the system of land-holding as a robbery, such a gift being against public policy. *Hutchins' Ex'r v. George et al.*, 14 Atl. Rep. 108 (N. J.).

TRUSTS — RESTRAINT ON ALIENATION. — Testator conveyed real estate in trust for his son, the rents and profits to be paid into his own hands, and not into another's, whether claiming by his authority or in any other capacity. *Held*, that the income should be paid to the son to the exclusion of all other persons, whether claiming as alienees or as creditors. *Smith v. Towers*, 14 Atl. Rep. 497 (Md.).

The court, of course, relied upon *Nichols v. Eaton*, 91 U. S. 725, *Bank v. Adams*, 133 Mass. 170, and the Penn. cases, admitting that the law was different in England and in most of the States. See Gray's Restraints on Alienation, § 258 *et seq*, where the author does not agree with the cases of spendthrift trusts.

TRUSTS — RESULTING — MINGLING OF FUNDS. — A guardian of an infant having purchased real estate chiefly with the money of his ward, he, however, contributing a portion, and having taken the title in his own name, a trust results in respect to the property in favor of the infant who may claim afterwards not merely a lien, as security for the money, but a proportionate share of the estate. *Bitzer v. Bobo et al.*, 38 N. W. Rep. 609 (Minn.).

For a discussion of the general principle see "The Right to Follow Trust Property," etc., 2 HARV. L. REV. 23.

UNRECORDED DEED — DOWER. — A was the grantee of certain lands by an unrecorded deed. Subsequently the grantor mortgaged the same lands to an innocent purchaser for value, and the mortgage was recorded. *Held*, that the right of dower of A's widow took priority over the mortgage. *Sondley v. Caldwell*, 6 S. E. Rep. 818 (S. C.).

This case, which certainly violates the spirit of our registry system (too often disregarded by the courts), seems wrong on principle. A widow's right of dower is made more effective than the right on which it depends, namely, her husband's right of title.

REVIEWS.

THE LAW OF SALES OF PERSONAL PROPERTY AS NOW ESTABLISHED IN THE UNITED STATES AND GREAT BRITAIN. By Nathan Newmark. San Francisco: Bancroft-Whitney Co., 1887. 12 mo. pp. xxi and 696.

The law of sales of personal property has been so well and fully discussed by Mr. Blackburn and Mr. Benjamin that a new treatise on the subject must possess extraordinary intrinsic merit to warrant its finding a foothold among text-books of standard authority. Mr. Newmark may be said to have fairly succeeded in his "attempt to make a concise, complete, and convenient presentation of the intricate and expanding law relating to sales of personal property," and, as a digest, his book may be found to be of considerable assistance to the practitioner.

It seems to us, however, that the author has placed too much reliance upon the "fulness of the index," and that the insertion of a table of cases would have enhanced in no small degree the usefulness of his work. To the lawyer who has become familiar with the leading cases there is nothing which renders the subject-matter of a book so readily accessible as a table of cases, and even the best-arranged index can scarcely be said to obviate its use.

From the many citations, such as "according to Bennett's Benjamin on Sales," "Schouler on Personal Property, § 188, whence paragraph derived," "Basis of paragraph: 1 Corbin's Benjamin on Sales, § 461," it must be inferred that the author has not made that personal origi-

nal research and investigation upon which, if comparisons are well made and distinctions finely drawn, the value of a treatise so largely depends.

The lawyer may make use of this work as the traveller makes use of a guide-book. It will lead him to mines of information, but into them, if he must know the truth as to what they contain, he must delve. Whether there is any need or demand for such a work is questionable, as the whole subject seems to be fully covered by the late editions of "Benjamin on Sales" by Mr. Bennett.

A. E. M.

BLACK ON TAX-TITLES. A TREATISE ON THE LAW OF TAX-TITLES, THEIR CREATION, INCIDENTS, EVIDENCE, AND LEGAL CRITERIA. By Henry Campbell Black. St. Louis, Mo. : Wm. H. Stevenson, 1888. 8 vo. pp. xxix, 452.

As the law of tax-titles "rests exclusively upon a statutory basis," it is rather difficult to present a treatise on tax-titles which shall not be a mere digest of statutes. This would obviously be a useless task and one which could not be accomplished within reasonable limits. The aim of the author, therefore, has been to point out the general features which the statutes of the several States have in common, and to discuss the main common-law questions arising out of the subject-matter. This he does clearly and less elaborately than his only competitor in the field, Blackwell, the fourth edition of whose work appeared in 1875. Mr. Black's book can be used to advantage only with an open statute book beside it. Its chief value lies in the fact that it traces the line of development of the law to the present day. As the author states in his preface, "the last half has witnessed the most important and radical changes introduced both through the action of legislative bodies and the interpretations of judicial tribunals in the law governing this subject." At one time such was the strictness of the law and the disfavor with which tax-titles were looked upon, that "a tax-title was no title at all," but more recently the courts and legislature have done much to give greater security to the holders of such titles.

B. G. D.

ESSENTIALS OF THE LAW, VOL. III., COMPRISING THE ESSENTIAL PARTS OF POLLOCK ON TORTS, WILLIAMS ON REAL PROPERTY, AND BEST ON EVIDENCE. By Marshall D. Ewell, M. D., LL. D., Professor of Law in Union College of Law, Chicago. Boston : Charles C. Soule. xvi and 243 pp.

In this, as in the preceding volumes of the series, Prof. Ewell has aimed to give a comprehensive abstract of the books selected; and he has met with admirable success. The books chosen need no comment; they are generally recognized as standards. The work of abstracting them has been done with excellent judgment; and the result is the more valuable from the fact that the exact words of the original authors have been retained as far as possible, the more important passages being printed in heavier type. To one who wishes a rapid, but at the same time thorough, review of these subjects, this little volume will be found very valuable. It is to be regretted that the desire to get as much as possible into a small compass has led the publishers to use type which though clear is still too small to be read for any length of time without effort, thus marring an otherwise excellent book.

G. P. F.

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HISTORY OF THE LAW OF BUSINESS COR- PORATIONS BEFORE 1800.

II.

(*Concluded.*)

THE fundamental difference in the constitution of business corporations from the earlier forms which preceded them is the joint-stock capital, and most of the law peculiar to this class of corporations relates to that difference, and the consequences which follow from it. From motives of convenience it early became customary to divide the joint stock into shares of definite amounts. The nature of the interest which it was conceived the holders of such shares possessed, and their rights and duties among themselves and against the corporation, so far as these were settled or discussed by the courts before the present century, will now be treated.

The most accurate definition of the nature of the property acquired by the purchase of a share of stock in a corporation is that it is a fraction of all the rights and duties of the stockholders composing the corporation.¹ Such does not seem to have been the clearly recognized view till after the beginning of the present century. The old idea was rather that the corporation held all its property strictly as a trustee, and that the shareholders were,

¹ Lowell, *Transfer of Stock*, § 4.

strictly speaking, *cestuis que trust*, being in equity co-owners of the corporate property.¹

There are several classes of cases illustrating this difference in theory. Thus, if the shareholders have in equity the same interest which the corporation has at law, a share will be real estate or personalty, according as the corporate property is real or personal. If it were personalty, as was usually the case, no question would arise, for then on any view the shares would be personalty likewise. Let it be supposed, however, that the corporate property was real estate; then, according to the view formerly prevailing, the shares must be devised and transferred according to the statutes regulating the disposition of real estate; they would be subject to the land tax; and, in short, would have to be dealt with in the same way as other equitable interests in land. Exceptions to this general rule would have to be made if special modes of transfer were prescribed by a statute of incorporation. This was generally the case; provision was ordinarily made that the title to shares should pass by transfer on the books, and also that they should be personal property.

The question arose several times in regard to the shares of the New River Water Company. The title to the real estate controlled by the company seems to have been in the individual shareholders, the company (which was incorporated) having only the management of the business.² It was uniformly held that the shares were real estate, that they must be conveyed as such *inter vivos*, that a will devising them must be witnessed in the same manner as a will devising other real estate,³ and that the heir and not the personal representative of a deceased owner was entitled to shares not devised.

The cases which were thus decided were afterwards distinguished⁴ on the ground that the title to a large part of the real estate was in the corporators, and as to all of it the company had no power to convert it into any other sort of property, but had simply the power of managing it. The distinction, however, amounts to noth-

¹ "The legal interest of all the stock is in the company, who are trustees for the several members." *Per* Lord Macclesfield, *Child v. Hudson's Bay Co.*, 2 P. Wms. 207.

² As to the nature of the company see *Bligh v. Brent*, 2 Y. & C. 268.

³ *Drybutter v. Bartholomew*, 2 P. Wms. 127; *Townsend v. Ash*, 3 Atk. 336; *Stafford v. Buckley*, 2 Ves. Sr. 171, 182; *Swaine v. Falconer*, Show. P. C. 207; *Sandys v. Sibthorpe*, 2 Dick. 545.

⁴ *Bligh v. Brent*, 2 Y. & C. 268, 296.

ing. If the individual proprietors owned the land and the company controlled it, the proprietors had two distinct kinds of property. One was real estate, and the fact that it was occupied by a corporation was immaterial; the other was personalty, consisting of the bundle of rights belonging to the shareholders in any corporate company. Moreover, the decisions do not indicate that they were based on such a distinction.¹ It was not until the decision of *Bligh v. Brent*,² in 1836, that the modern view was established in England. The contention of the counsel for the plaintiff in that case, that the company held the corporate property as a trustee, and that the interest of the *cestui que trust* was coextensive with the legal interest of the trustee, was well warranted by the decisions which he brought forward to sustain it. Indeed, the greater part of the argument for the defendant admitted this, but contended that real estate held by a corporation for trading purposes should be treated as personalty, like that similarly held by a partnership.³

It is true that it was decided in 1781, in *Weekley v. Weekley*,⁴ that shares in the Chelsea Water Works were personalty; but no reasons are given for the decision, and it may have been based on the facts that a large part of the property of the company was personalty,⁵ and that the shares were generally considered personalty, and dealt with as such. Otherwise the case seems inconsistent with the cases and reasoning previously alluded to.

In the case of the *King v. The Dock Company of Hull*⁶ an attempt was made to apply conversely the principle that the property of a corporation and of its individual corporators is the same, except that the interest of the former is legal, of the latter, equitable. The act under which the company was formed⁷ declared that the shares of the proprietors should be considered as personal property. It was argued that this made the real estate

¹ See further, *Howse v. Chapman*, 4 Ves. 542, where a share in the Bath navigation was held to be real estate, and also *Buckeridge v. Ingram*, 2 Ves. 652, as to the Avon navigation. The latter company was not, it is true, incorporated, but the decision is not based on that distinction.

² 2 Y. & C. 268.

³ In *Wells v. Cowles*, 2 Conn. 567, it was decided that turnpike shares were real estate. The argument was almost wholly confined to the question whether the property of the company was real estate or not. It was very summarily remarked that the property of the individual shareholders was of the same nature as that of the company.

⁴ 2 Y. & C. 281, note.

⁵ It was said in *Bligh v. Brent*, *supra*, that five-sixths of the property of the company was personalty.

⁶ 1 T. R. 219.

⁷ 14 Geo. III., c. 56.

of the corporation personalty, and hence not subject to the land tax. The court overruled the objection, not on the ground that the property of the corporation was entirely different from that of the shareholders, but because, "as between the heir and executor, this (the real estate of the company) is to be considered as personal property, but the Legislature did not intend to alter the nature of it in any other respect."

Another class of cases illustrating the theory now under consideration arose from the transfer of stock on the books of the company by fraud or mistake without the consent of the owner. When it is understood that the right of a shareholder is a legal right, it is obvious that such a transfer cannot effect his rights unless he is estopped to assert them.¹ If, however, the legal interest is in the corporation, and the right of a shareholder is only equitable, the transferee, in the case supposed, will acquire title, though perhaps he may not be allowed to retain it. The latter view was taken in all the cases which arose prior to the year 1800. One of the earliest of them was *Hildyard v. The South Sea Company and Keate*.² The plaintiff's stock had been transferred to Keate, an innocent purchaser, under a forged power of attorney. The court decided that the plaintiff was entitled to relief, and that the loss must fall on Keate. Apparently the court was of opinion, however, that until relief was given Keate was the actual stockholder, and not the plaintiff. Thus, it is assumed that the dividends which Keate had received were the dividends on the plaintiff's stock, and that they must be recovered at the suit of the plaintiff, not of the company. Further, the company is directed to "take this stock from the defendant Keate and restore it to the plaintiff." The case was afterwards overruled,³ but in a way which served rather to emphasize the theory that the legal title to all the stock of a corporation is in the corporation itself.⁴

In *Harrison v. Pryse*⁵ the facts were substantially the same, except that the defendant was not a purchaser for value. The company was not made a party. The plaintiff recovered the full value of his stock on the theory that it had been converted. The transfer on the books of the company, though without the plaintiff's authority, was assumed to have divested him of his stock.

¹ For a careful exposition of the modern view see Lowell, *Transfer of Stock*.

² 2 P. Wms. 76 (1722).

³ *Ashby v. Blackwell*, Amb. 503.

⁴ See also *Monk v. Graham*, 8 Mod. 9. ⁵ *Barnard*, Ch. 324 (1740).

Lord Hardwicke, who decided the case, was of opinion that in case the estate of the defendant proved insufficient to satisfy the plaintiff's claim the company might be liable. "His reason was that the company must be considered as trustees for the owner at the time he purchased this stock, and as the stock had not been transferred with any privity of his, they must be considered as continuing his trustees."

The last and most explicit of this series of cases was decided by Lord Worthington in 1765.¹ The facts were the same as in *Hildyard v. The South Sea Company*.² It was admitted that the plaintiff was entitled to relief, and the only question was which of the defendants should bear the loss. It was decided that it must fall on the bank. The reason given was that "a trustee, whether a private person or body corporate, must see to the reality of the authority empowering them (*sic*) to dispose of the trust money." Again, it is said by the Chancellor, "I consider the admission and acceptance of the transfer as the title of the purchaser."

Whether a contract for the sale of stock was a contract for the sale of goods, wares, or merchandise, within section 17 of the Statute of Frauds, is a question which was several times considered but not definitely decided in the eighteenth century. In *Pickering v. Appleby*³ the judges were divided six to six as to whether a contract for the sale of ten shares of the Company of the Copper Mines required a memorandum in writing to make it enforceable. In other cases,⁴ also, the point came up, but they went off on other grounds.

Whether specific performance could be had of such a contract is another question which was raised in the early part of the eighteenth century, because of the enormous fluctuations in prices at that time.⁵ The earliest case was *Cud. v. Rutter*,⁶ decided in 1719.

¹ *Ashby v. Blackwell and The Million Bank*, Amb. 503.

² 2 P. Wms. 76.

³ 1 Com. 354, referred to in *Colt v. Netterville*, 2 P. Wms. 304, 308.

⁴ *Colt v. Netterville*, 2 P. Wms. 304; *Mussell v. Cooke*, Prec. in Ch. 533. In this last case the court seemed of opinion that a memorandum was necessary.

⁵ Caused by the expected vast profits of the South Sea Company and other "bubbles," and the subsequent collapse of these speculations.

⁶ 1 P. Wms. 570: *sub nom.* *Cuddee v. Rutter*, 5 Vin. Abr. 538, pl. 21; *sub nom.* *Scould v. Butter*, 2 Eq. Cas. Abr. 18, pl. 8.

In *Gardener v. Pullen*, 2 Vern. 394; s. c. Eq. Cas. Abr. 26, pl. 4, which was a bill to be relieved from the penalty of a bond conditioned to be void on the transfer of certain East India stock, the court refused to relieve unless the stock was transferred; and to the same effect is *Thompson v. Harcourt*, 2 Bro. Par. Cas. 415.

Sir Joseph Jekyll decreed specific performance of a contract for the sale of South Sea stock, and Lord Chancellor Parker overruled the decree, his chief reason being, "Because there is no difference between this £1,000 South Sea stock and £1,000 stock which the plaintiff might have bought of any other person upon the very day."¹

There is nothing to indicate that any distinction was supposed to exist between South Sea stock, which was government stock with certain additional rights, and shares in ordinary companies. Moreover, two years later Lord Macclesfield dismissed a bill for specific performance of a contract for the sale of £1,000 stock in the York Buildings Company, which was an ordinary joint-stock corporation, on the ground that the proper remedy was at law.²

The only foundation afforded before the year 1800 for the view now prevailing in England,³ that contracts for the sale of shares, as distinguished from government stock, will be specifically performed, is the case of *Colt v. Netterville*,⁴ a bill for specific performance of a contract for the transfer of York Buildings stock, which was demurred to. Lord King overruled the demurrer, saying that the case might be "attended with such circumstances that may make it just to decree the defendant either to transfer the stock according to the express agreement, or at least to pay the difference." This, however, is altogether too indefinite to be regarded as disapproval of the previous cases, and it may be confidently stated that the former rule on this point in England was the same as that now prevailing in this country;⁵ that is, in the absence of special circumstances, such contracts will not be specifically enforced.⁶

Though the corporation was looked upon as a trustee and the shareholders as *cestuis que trust*, it was of course perfectly well

¹ See also, to the same effect, *Cappur v. Harrison*, Bunb. 135; *Nutbrown v. Thornton*, 10 Ves. 159.

² *Dorison v. Westbrook*, 5 Vin. Abr. 540, pl. 22.

³ See Fry on Spec. Perf., part vi. ch. 1.

⁴ 2 P. Wms. 304.

⁵ *Moraw Corp.* (2d ed.) § 218.

⁶ It was, indeed, said by Lord Eldon in *Nutbrown v. Thornton*, 10 Ves. 159, after he had remarked that it was perfectly settled that the court would not decree specific performance of an agreement to transfer stock, "In a book I have of Mr. Brown's, I see Lord Hardwicke did that;" but there is no record of any such decision by Lord Hardwicke, and further, there is an express dictum by him to the contrary in *Buxton v. Lister*, 3 Atk. 383.

recognized that there were rights and obligations not incident to an ordinary trust.

The practice of keeping books to record the transfer of stock was adopted by the East India Company, perhaps from its inception, and transfer on the books was regarded as essential for passing the title. Thus in 1679, in a suit for an account against a fraudulent assignee of East India stock, the company being joined,¹ the court decree that the company "do, upon application made to them, according to their custom, transfer back the said £150 stock to the plaintiff;" and it was customary to insert in the early charters incorporating business associations, a provision that the shares might be assigned by entry in a book kept for that purpose.² Therefore, one of the earliest well-recognized rights of a shareholder was to have his name kept upon the transfer book so long as he held stock;³ and, in consequence of the assignability of shares, to have the name of his assignee substituted, if he parted with his interest.⁴ It follows that if the company transferred stock, however innocently, without due authority from the owner, it was liable. Several cases arose of such transfers, where the company acted in compliance with a forged power of attorney.

In all these cases,⁵ it seems to have been decided or assumed that the company was bound to reinstate the original owner on its books, as well as to pay him the dividends that had accrued, though the reasoning on which these decisions were based was influenced by the notion previously adverted to, that the shareholder occupied the position of a *cestui que trust*.

When shares were held in trust, of course, it was the name of the trustee which appeared upon the books; he and not the beneficial owner was entitled to all the rights of a shareholder.⁶ This was fully recognized by the courts; and not only this, but it was laid down that the company, after express notice that stock was held in trust, was at liberty to ignore the fact, even so far as

¹ Cas. temp. Finch, 430.

² See, *e.g.*, in the case of the Greenland Company, 4 and 5 Wm. & M. c. 17, s. xxiv., in the case of the Bank of England, 5 and 6 Wm. & M. c. 20, s. xxv., in the case of the Nat. Land Bank, 7 and 8 Wm. III., c. 31, s. xvii.

³ Bank of Eng. v. Moffatt, 3 Bro. C. C. 160; Johnson v. E. I. Co., Cas. temp. Finch, 430.

⁴ Cock v. Goodfellow, 10 Mod. 489, 498, 20 Vin. Abr. 5, pl. 16.

⁵ See *supra*.

⁶ Stockdale v. South Sea Co. 1 Atk. 140; s. c. Barnard. Ch. 363; Hartga v. Bank of England, 3 Ves. 55; Bank of England v. Parsons, 5 Ves. 664.

to allow the trustee to commit a fraud on the *cestui que trust* unless the trust appeared on the books.¹ The right to such complete disregard of equitable interests rested perhaps not so much on decisions as on dicta which may be attributed to a careless over-emphasis of the fact that the legal interest, and, in general, the entire control of stock held in trust, is in the trustee.

In case of refusal by the officers of a company to transfer on the books at the request of the owner of stock, the proper remedy was not wholly clear in the last century. In the case of *King v. Douglass*² an application was made for a mandamus to compel a transfer. Lord Mansfield refused to allow this extraordinary remedy, and suggested a special action of *assumpsit*, and probably that action would have been held proper. Whether specific performance of the obligation would be enforced by equity was not suggested, but it is not unlikely that such a remedy would have been allowed.³

The right of a shareholder to vote at the election of officers, and in regard to by-laws for the management of a business corporation, was formerly precisely analogous to the similar right necessarily possessed by the members of all corporations from their origin, such as the members of a municipal corporation, for instance, still possess. That is, each shareholder was entitled to one vote if given by him in person. This was at first the rule in the East India Company, but naturally enough, it soon became distasteful to the larger owners, and various changes were made at different times; for example, that only holders of £500 stock should have the right to vote, the smaller holders being allowed to pool their stock to make up the necessary amount.⁴ This was simply a restriction of the suffrage. The units of which the corporation was composed were still considered to be the members, as is the case in municipal corporations and guilds, — not shares, as is the case in the modern joint-stock corporation. The gradual progress from the old view to the modern one is shown by the changes in the power of voting. It soon became usual to allow the larger holder more than one vote, and it was customarily provided in the charters how many votes should belong to the owner of a given num-

¹ *Stockdale v. South Sea Co.*, 1 Atk. 140; s. c. Barnard. Ch. 363.

² 2 Doug. 524.

³ See *Mellorucchi v. Royal Exchange Ass. Co.*, 1 Eq. Cas. Abr. 8, pl. 8; *Gibson v. Hudson's Bay Company*, 1 Str. 645.

⁴ Macpherson, *Hist. of Com.* 125.

ber of shares, the owner of a large number having more votes than the owner of a few, but not proportionately more. Thus, in the Greenland Company, each subscriber of £500 had one vote, each subscriber of £1000 or more had two votes, and in no case could a shareholder have a greater number, however great his holding might be;¹ and in other charters are similar provisions. Except for some such provision, no doubt, each shareholder would have been entitled to but one vote. It did not take very great ingenuity to devise a plan by which owners of large amounts of stock could, in effect, secure a number of votes in proportion to their holdings. All that was necessary was to make temporary transfers of stock to a number of friends,—a practice called “splitting stock.” The preamble of an act passed in 1766² shows the custom at that time. It recites “certain publick companies or corporations have been instituted for the purpose of carrying on particular trades or dealings with joint stock, and the management of the affairs of such companies has been vested in their general courts, in which every member of each company possessed of such share in the stock as by the charter is limited, is qualified to give a vote or votes;” and it is further recited that “of late years a most unfair and mischievous practice has been introduced, of splitting large quantities of stock, and making separate and temporary conveyances of the parts thereof for the purpose of multiplying or making occasional votes immediately before the time of declaring a dividend, of choosing directors, or of deciding any other important question, which practice is subversive of every principle upon which the establishment of such general courts is founded, and if suffered to become general, would leave the permanent welfare of such companies liable at all times to be sacrificed to the partial and interested views of a few.” It is then provided by the act that in future members who have not held their stock for at least six months shall not vote.

As an instance of the conservatism of the English law in matters of form it may be mentioned that by the English Companies Act of 1862 the votes of shareholders are limited, so that one vote is allowed for every share up to ten, for every five shares between ten and one hundred, and for every ten shares beyond that.³ But

¹ 4 and 5 Wm. & M., c. 17, s. xvii.

² 7 Geo. III., c. 48.

³ Buckley on the Companies Acts (4th ed.), 436.

it is now held that a shareholder may distribute his stock in lots of ten among his friends, and thereby secure, in a clumsy and troublesome way, a vote for every share.¹

The right to vote by proxy was not allowed at common law, in the absence of some special authorization.² This was often given in the charter.³ Contrary to what is now generally held,⁴ it is very doubtful if the authority of a by-law would have been held in the last century sufficient to confer the right.⁵

That the directors of a corporation shall manage its affairs honestly and carefully is primarily a right of the corporation itself rather than of the individual stockholders. The question may, however, be considered in this connection.

The only authority before the present century is the case of *The Charitable Corporation v. Sutton*,⁶ decided by Lord Hardwicke. But this case is the basis, mediate or immediate, of all subsequent decisions on the point, and it is still quoted as containing an accurate exposition of the law.⁷ The corporation was charitable only in name, being a joint-stock corporation for lending money on pledges. By the fraud of some of the directors or "committee-men," and by the negligence of the rest, loans were made without proper security. The bill was against the directors and other officers, "to have a satisfaction for a breach of trust, fraud, and mismanagement." Lord Hardwicke granted the relief prayed, and a part of his decision is well worth quoting. He says, "Committee-men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation.

"In this respect they may be guilty of acts of commission or omission, of malfeasance or nonfeasance."⁸

"Now, where acts are executed within their authority, as repealing by-laws and making orders, in such cases, though attended with bad consequences, it will be very difficult to determine that

¹ *Moffat v. Farquhar*, 7 Ch. D. 591, and cases therein cited.

² *Phillips v. Wickham*, 1 Paige Ch. 590; *State v. Tudor*, 5 Day, 329; *Taylor v. Griswold*, 14 N. J. L. 222; *People v. Twaddell*, 18 Hun, 427; *Common. v. Bringham*, 103 Pa. St. 134; *Harben v. Phillips*, 23 Ch. D. 14.

³ *E.g.*, the charter of the Mine Adventurers, 9 Anne, c. 24, or of the Northumberland Fishery Soc., 29 Geo. III., c. 25.

⁴ *Common. v. Bringham*, 103 Pa. St. 134, and cases therein cited.

⁵ See the early case of *Taylor v. Griswold*, 14 N. J. L. 222 (1834).

⁶ 2 Atk. 400.

⁷ *Taylor on Corp.* § 619.

⁸ Citing *Domat's Civil Law*, 2d B., tit. 3, secs. 1 and 2.

these are breaches of trust. For it is by no means just in a judge, after bad consequences have arisen from such executions of their power, to say that they foresaw at the time what must necessarily happen, and therefore were guilty of a breach of trust.

"Next as to malfeasance and nonfeasance.

"To instance in non-attendance; if some persons are guilty of gross non-attendance, and leave the management entirely to others they may be guilty by this means of the breaches of trust that are committed by others.

"By accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence, and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and therefore they are within the case of common trustees.¹

"Another objection has been made that the court can make no decree upon these persons which will be just, for it is said that every man's non-attendance or omission of duty is his own default, and that each particular person must bear such a proportion as is suitable to the loss arising from his particular neglect which makes it a case out of the power of this court. Now, if this doctrine should prevail, it is indeed laying the axe to the root of the tree. But if, upon inquiry before the master, there should appear to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all liable.

"Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity."

The members of any corporation were entitled to inspect the books of the corporation. The only difference between business and other corporations as to the right of inspection was this: The books of municipal corporations and guilds might be inspected by non-members under certain circumstances, because the regulations of such bodies were not binding on members alone, and consequently outsiders might be vitally interested in the corporate proceedings.² Business corporations, on the other hand, were private, and the right of inspection belonged solely to members.³

The most important right of shareholders, the right to divi-

¹ Citing *Coggs v. Bernard*, 1 Salk. 26.

² See *Grant on Corp.* 311-313.

³ *Charitable Corp. v. Woodcraft*, Cas. temp. Hard. 130.

dends, was of course always recognized. It is necessarily implied in the conception of a joint-stock company. No cases, however, seem to have been decided before the year 1800 which illustrate the nature of the right. The same remark applies to the right of a shareholder to share in the distribution of the capital stock if the affairs of the corporation are wound up.

The correlative duties imposed on a shareholder were fewer and simpler than his rights. In the first place, he was bound to pay to the corporation, when called upon, the amount of his share in the joint stock, or so much of it as had not been paid by prior holders. The practice of paying in instalments for stock subscribed seems to have arisen at an early date. It is referred to as common in 1723. Lord Macclesfield speaks of "the common by-laws of companies to deduct the calls out of the stocks of the members refusing to pay their calls."¹

In 1796 the question arose whether an original subscriber could avoid liability for future calls by assigning his stock.² It was contended that the case was like the assignment of a lease, "in which, though the lessor consents to the lessee's assigning to a third person, he does not give up his remedy against the original lessee." The Court of King's Bench, however, decided that assignees held the shares on the same terms as the original subscribers, and were substituted in their places. The objection that an assignment might be made to insolvent persons was met by saying that it was presumed that the undertaking was a beneficial one, and therefore the right to forfeit shares for non-payment of calls furnished a sufficient check.

No doubt it has been settled for a long time that individual members are not liable for the debts of a corporation, and it has even been said that "the personal responsibility of the stockholders is inconsistent with the nature of a body corporate;"³ yet in the Roman law it seems that if the corporation became insolvent the persons constituting it were obliged to contribute their private fortunes;⁴ and though it may be hazardous to assert that at common law the rule was the same in England, it is certain that, so far as the evidence goes, it points to that conclusion.

¹ *Child v. Hudson's Bay Co.*, 2 P. Wms. 207.

² *Huddersfield Canal Co. v. Buckley*, 7 T. R. 36.

³ *Myers v. Irwin*, 2 S. & R. 371, *per* Tilghman, C. J.

⁴ Ayliffe, 200, referring to code, Bk. i. tit. 3; Savigny Sys. § 92.

This was not on any theory that the debt of the corporation was directly the debt of its members, for the contrary seems to have been well understood. For instance, in *Y. B. 19 Hy. VI. 80*, it was held that an action of debt being brought against the Society of Lombards, and the sheriff having distrained two individual Lombards, trespass would lie against him. "For where a corporation is impleaded they ought not to distrain any private person." And in the case of *Edmunds v. Brown*¹ it was held that certain members of the Company of Woodmongers, who had signed a bond as its officers, were not personally liable when the company was dissolved.² If, however, there was an obligation running to the corporation from its members, to be answerable to the corporation for the liability of the latter to the outside world,³ this obligation would be part of its assets, which, though not available in a law court, could be reached in equity, and so indirectly the members could be forced to discharge the corporate debts. That such was the case was directly decided in the case of *Dr. Salmon v. The Hamborough Company*.⁴ This was an appeal to the Lords from the dismissal of a bill in Chancery against the Hamborough Company and some of its individual members, setting forth that the company owed the plaintiff money, but had nothing to be distrained by, and could, therefore, not be made to appear.⁵ The Lords ordered that the dismissal be reversed, and that if the company did not appear the bill should be taken *pro confesso*, and in that event, and also in case the company appeared and the plaintiff's claim was found just, a decree should be made that the company pay; and on failure to do so for ninety days, "that the governor or deputy governor and the twenty-four assistants of the said company, or so many of them as by the tenor of their charter do constitute a quorum for the making of levitations upon the trade or members of the said company, shall make such a leviation upon every member of the said company as is to be contributory to the public charge, as shall be sufficient to satisfy the sum decreed to the plaintiff;" and in case of failure to answer these

¹ 1 Lev. 237.

² See also *Bishop of Rochester's Case*, Owen, 73; s. c. 2 And. 106; *Case of the City of London*, 1 Vent. 351.

³ That there was such an obligation in the Roman law see Savigny, § 92.

⁴ Ch. Cas. 294; s. c. 6 Vin. Abr. 310.

⁵ A *distringas* was the proper and only process against a corporation. *Curson v. African Co.*, 1 Vern. 182; *Harvey v. E. I. Co.*, 2 Vern. 395; 3 Keb. 230, pl. 8.

"leviations," process of contempt should issue against them. By a note to *Harvey v. East India Company*,¹ it may be seen that the course thus outlined was actually carried out, and the individual members were charged in their private capacities. It is true that the Hamborough Company was a regulated, not a joint-stock, corporation; but there seems to be no reason why the question should not be the same for both kinds, or that, when the case was decided, there was supposed to be any distinction. Indeed, there is no case decided before the present century which is inconsistent with the theory that members of a corporation are thus liable, though very possibly that idea became contrary to the general understanding.

In another early case² creditors who were members of the indebted company were postponed to the other creditors. Lord Nottingham says, "That if losses must fall upon the creditors, such losses should be borne by those who were members of the company, who best knew their estates and credit, and not by strangers who were drawn in to trust the company upon the credit and countenance it had from such particular members."

The case of *Dr. Salmon v. The Hamborough Company* was criticised by Fonblanque in 1793.³ It was, however, followed to its fullest extent in South Carolina so late as 1826 in a very carefully considered case, and on appeal the decision was affirmed.⁴ Even after 1840 the doctrine for which the case stands found support.⁵

The ways in which a corporation might be dissolved, and the consequences of dissolution, were fully considered by the older writers. It was laid down that a corporation might be dissolved, 1st, by act of Parliament; 2d, by the natural death of all its members; 3d, by surrender of its franchises; 4th, by forfeiture of

¹ 2 Vern. 396.

² *Naylor v. Brown, Finch*, 83 (1673).

³ 1 Fonblanque Eq. (1st ed.) 297, note. The learned author also suggests that the Hamborough Company was not incorporated, but in Viner's report of the case it is expressly called a corporation, and it appears that as a matter of fact it had been chartered. Ang. and Ames on Corp. (11th ed.) 42; 4 Am. Law Mag. 366, note.

⁴ *Hume v. Windyaw and Wando Canal Co.*, 1 Car. L. J. 217; s. c. 4 Am. L. Mag. 92.

⁵ 1 Am. Law Mag. 96, answered in 4 Am. Law Mag. 363. See also a small pamphlet by A. L. Oliver, entitled "The Origin and Nature of Corporate Powers and Individual Responsibility of the Members of Trading Corporations at Common Law," in which the author favors the view here expressed, though on the broader, and it seems untenable, ground that a corporation is in its nature a partnership with a right to sue by one name.

its charter through negligence or abuse of its franchises.¹ The second of these methods is inapplicable to business corporations, for the shares of the members are property and would pass to their personal representatives. Further, it should be added that a corporation may be dissolved by the expiration of the time limited in its charter.

Forfeiture of a charter was enforced by *scire facias* or an information in the nature of *quo warranto*. It is only in connection with the question of forfeiture that importance was attached to the fact that a corporation had acted in excess of the authority given by its charter. Not a trace of the modern doctrine of *ultra vires* is to be found before the present century.² The other ways in which a corporation could be dissolved need no elaboration.³

Kyd says,⁴ "The effect of the dissolution of a corporation is, that all its lands revert to the donor, its privileges and franchises are extinguished, and the members can neither recover debts which were due to the corporation, nor be charged with debts contracted by it in their natural capacities. What becomes of the personal estate is, perhaps, not decided, but probably it vests in the crown."

The accuracy of the statement that the lands of a dissolved corporation revert to the donor has been doubted in Gray on Perpetuities.⁵ After a very careful examination of authorities the learned author arrives at the conclusion that the lands would escheat, and offers the following explanation to account for the prevalence of the theory which he controverts. Most early corporations held their lands in frankalmoign, a tenure in which the lord was always the donor. Hence, on the dissolution of a corporation, its lands, though they escheated, would generally go to the donor.

The explanation is ingenious, and very likely true. It may, however, be urged that Lord Coke, to whose statements⁶ are to be attributed, in the main, the wide acceptance in later times of the doctrine under consideration, is not likely to have made such a palpable blunder in regard to a question of tenure. The sug-

¹ 1 Blackst. Com. 485, and to the same effect, 2 Kyd, 446.

² Brice, *Ultra Vires* (2d ed.), x.

³ They are fully discussed in 2 Kyd, 446, Grant on Corp. 295, and elsewhere.

⁴ Vol. ii. 516.

⁵ §§ 46-51.

⁶ Co. Lit., 13 b; Dean and Canons of Winsor v. Webb, Godb. 211.

gestion is offered with diffidence, that a real or fancied analogy in the civil law may be the true foundation on which the doctrine rests. The early English law of corporations is borrowed almost wholly from the Roman law.¹ This certainly creates an antecedent probability in favor of the suggestion offered. Domat says, "If a corporation were dissolved by order of the Prince, or otherwise, the members would take out what they had of their own in the corporation."² This confines the application of the rule to members; but it may have been regarded as applying to any donor of a corporation, or may, at least, have furnished an analogy.

The doctrine itself, whatever its basis may have been, was uniformly quoted by judges and text-writers as accurate,³ excepting in one case.⁴

The disposition of the personality of a corporation on its dissolution was not discussed by the early writers, undoubtedly because of the insignificance at that time of personal property. No expression of judicial opinion on the matter is to be found. Kyd's remark⁵ probably represents the generally received opinion at the time he wrote.⁶

The statement was made by Blackstone⁷ that "the debts of a corporation either to or from it are totally extinguished by its dissolution." This remark has been repeated by later authors, and has led to some confusion. It was, undoubtedly, an error. The only authority cited to support it is *Edmunds v. Brown*.⁸ The Company of Woodmongers had been dissolved. It had given a

¹ Mackenzie, *Studies in Roman Law*, 149; *Grant on Corp.* 2.

² Vol. ii, bk. i, tit. 15, § 2, ¶ 8.

Mackenzie (*Studies in Roman Law*) says that no positive rule can be laid down as to what became of the property of a dissolved corporation; that it varied according to the nature of the corporation.

³ 1 Roll. Abr. 816 a; Moore, 282, 283, pl. 435; *per* Lord Hardwicke in *Atty.-Gen. v. Gower*, 9 Mod. 224, 226; *per* Lord Mansfield in *Burgess v. Wheate*, 1 W. Bl. 123, 165; *Law of Corp.* 300; Wood, *Inst.* bk. i. c. viii.; 1 Blackst. Com. 484; 2 Kyd, 516; Bell's *Principles* (Scotch), § 2190.

⁴ *Johnson v. Norway, Winch, 87, and Co. Lit.* 13 b, Hargrave's note. In the case as reported no decision is given. The only authority is Hargrave's statement that in Lord Hale's MS. it is said that the court finally decided that the land should go to the lord, not to the donor.

⁵ *Supra.*

⁶ The same statement is made by counsel *arguendo* in *Colchester v. Seaber*, 3 Burr. 1868.

⁷ 1 Com. 484.

⁸ 1 Lev. 237.

bond to the plaintiff, which was signed by the defendants for the company. This action was debt on the bond against the individuals who signed it. The plaintiff failed, and rightly, for the bond was not executed by the defendants as individuals but for the company. The difficulty, however, was simply in the remedy which the plaintiff chose. This is evident from the case of *Naylor v. Brown*,¹—a suit in equity by the creditors of the Woodmongers' Company, begun immediately after the failure of the action at law just referred to. On the dissolution of the company, the members had divided up its property. It was decreed that the property should be returned, "it being in equity still a part of the estate of the late company," and that the debts due the plaintiffs should be discharged from the fund so formed. This important case, which seems to have been generally overlooked,² clearly shows that the property of a dissolved corporation was liable in equity for the corporate debts, although they were unenforceable at law.

Whether debts owing to a dissolved corporation could be enforced for the benefit of the creditors or members of the corporations, or for the benefit of the State as *bona vacantia*, was not decided before the year 1800.

The history of the law of business corporations has thus far been treated with reference only to English decisions. In this country questions pertaining to corporations were brought before the courts in very few cases until the present century.

Pennsylvania is entitled to the honor of having chartered the first business corporation in this country,³ "The Philadelphia Contributionship for Insuring Houses from Loss by Fire." It was a mutual insurance company, first organized in 1752, but not chartered until 1768. It was the only business corporation whose charter antedated the Declaration of Independence. The next in order of time were: "The Bank of North America," chartered by Congress in 1781 and, the original charter having been repealed in 1785, by Pennsylvania in 1787; "The Massachusetts Bank," chartered in 1784; "The Proprietors of Charles River Bridge," in 1785; "The Mutual Assurance Co." (Philadelphia), in 1786; "The Associated Manufacturing Iron Co." (N.Y.), in 1786.

¹ Finch, 83.

² It is not referred to by Blackstone, Kyd, Kent, Angell and Ames, Field, Taylor, Morawetz or any other writer on the subject so far as observed.

³ Laws of Pa. ch. dlxxvi.

These were the only joint-stock business corporations chartered in America before 1787. After that time the number rapidly increased, especially in Massachusetts. Before the close of the century there were created in that State about fifty such bodies, at least half of them turnpike and bridge companies. In the remaining States combined, there were perhaps as many more. There was no great variety in the purposes for which these early companies were formed. Insurance, banking, turnpike roads, toll-bridges, canals, and, to a limited extent, manufacturing¹ were the enterprises which they carried on.

The rapid growth of corporations was followed in the early decades of the present century by the judicial decision of the questions which naturally arose as to the nature of the bodies which had been created by the Legislature, their rights and duties, and the rights and duties of their stockholders. But not even a beginning of this development was made prior to the year 1800. Before that time, whatever knowledge of these matters American lawyers possessed must have been derived from the English cases and English text-books previously considered.

Samuel Williston.

CAMBRIDGE, MAY 31, 1888.

¹ There were several manufacturing companies in Massachusetts, but very few in other States.

INDIANS AND THE LAW.

THE American student could select few single subjects the survey of which would bring under view a greater variety of important general principles, or afford more scope for forensic reasoning in the application of such principles, than the law relating to Indians. The progress of events has given additional interest at the present day to many of the questions thus presented.

A large part of the Indians in the United States are now upon great reservations between the Mississippi and the Rocky Mountains. The advancing tide of Western immigration, before which they have been removed thither, is pressing upon them; and to the task of keeping these Indians within the boundaries of their reservations — which has long required an army — has been added the task of keeping the white men off the reservations, a task which no army can continuously perform.

The necessity of law for the Indians, for their own protection and welfare, is now obvious. The necessity of it for the protection and welfare of the white population and the peaceful administration of State and Territorial government is equally obvious.

The reader who is inclined either to trace the history of the legal relations of the Indian in this country, or to inform himself of the present status of the Indian before the law in what is known as the Indian country at the West, and the pending modifications of that law, will find it convenient to note that the principles now in operation have been gradually developed by a process which may be conveniently distinguished in three successive but contrasted periods, which lead up to a fourth period, upon which we are now entering.

For more than a third of a century after the adoption of the present Federal Constitution, and indeed down to the year 1829, our government continued to act under the traditions of the time when white colonists were contending with the red men for possession of the continent, and, so far as relations were pacific, dealt with them upon the principles of international law which civilized states usually adopt in dealing with uncivilized states. During

this period our courts constantly asserted our title to the soil by right of discovery, and extended that claim, territorially, as fast as the progress of colonization and emigration carried the advancing line of white settlement westward. (See 3 Kent's Commentaries, 378-400; Note on the Sources of American Colonial Law, 17 Abbott's New Cases, 486-491.) But at the same time the Executive dealt with such tribes under the forms with which it dealt with foreign nations, and defined their rights by treaties supposed to be subject to the rules governing treaties between equal sovereign states. The basis upon which such treaties were made is very lucidly indicated by Mr. Justice Miller, in delivering the opinion of the Supreme Court of the United States in the case of the *United States v. Kagama* (118 U. S. 375, 381), as follows:—

"The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.

"Following the policy of the European government in the discovery of America toward the Indians who were found here, the colonies before the Revolution, and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase, by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the State within whose limits they resided.

"Perhaps the best statement of their position is found in the two opinions of this court by C. J. Marshall in the case of the Cherokee

Nation *v.* Georgia, 5 Peters, 1, and in the case of Worcester *v.* State of Georgia, 6 Peters, 536. These opinions are exhaustive; and in the separate opinion of Mr. Justice Baldwin in the former is a very valuable *résumé* of the treaties and statutes concerning the Indian tribes previous to and during the confederation.

“In the first of the above cases it was held that these tribes were neither states nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them.”

This recognition, however, of Indian tribes as bodies politic, in the nature of independent states, never conceded their title to the soil, but only a permissive occupancy. From the first, the title to land in Indian occupancy has always and consistently been maintained in the government. This fundamental doctrine has recently been clearly stated by Mr. Justice Field, in delivering the opinion of the same court in the case of Buttz *v.* Northern Pacific Railroad Co. (119 U. S. 55, 66), in determining the effect of a government grant to the railroad company of lands in the occupancy of Indians, followed by the surrender of the Indian right of occupancy to the government. He says :—

“At the time the act of July 2d, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The railroad company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals. As we said in Beecher *v.* Wetherby : ‘It is to be presumed that in

this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action toward the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government.' (95 U. S. 517, 525.) In support of this doctrine several authorities were cited in that case.

"In *Johnson v. McIntosh* (8 Wheaton, 575), which was here in 1823, the court, speaking by Chief Justice Marshall, stated the origin of this doctrine of the ultimate title and dominion in the United States. It was this: that, upon the discovery of America, the nations of Europe were anxious to appropriate as much of the country as possible, and, to avoid contests and conflicting settlements among themselves, they established the principle that discovery gave title to the government by whose subjects or by whose authority it was made, against all other governments. This exclusion of other governments necessarily gave to the discovering nation the sole right of acquiring the soil from the natives, and of establishing settlements upon it. It followed that the relations which should exist between the discoverer and the natives were to be regulated only by themselves. No other nation could interfere between them. The Chief Justice remarked that 'the potentates of the Old World found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the New, by bestowing on them civilization and Christianity in exchange for unlimited independence.' Whilst thus claiming a right to acquire and dispose of the soil, the discoverers recognized a right of occupancy or a usufructuary right in the natives. They accordingly made grants of lands occupied by the Indians, and these grants were held to convey a title to the grantees, subject only to the Indian right of occupancy. The Chief Justice adds, that the history of America, from its discovery to the present day, proves the universal recognition of this principle.

"In *Clark v. Smith* (13 Peters, 195), which was here in 1839, the patent under which the complainant became the owner in fee of certain lands was issued by the Commonwealth of Kentucky

in 1795, when the lands were in possession of the Chickasaw Indians, whose title was not extinguished until 1819. It was objected that the patent was void because it was issued for lands within a country claimed by Indians ; but the court replied, 'That the colonial charters, a great portion of the individual grants by the proprietary and royal governments, and a still greater portion by the States of this Union after the Revolution, were made for lands within the Indian hunting-grounds. North Carolina and Virginia, to a great extent, paid their officers and soldiers of the Revolutionary war by such grants, and extinguished the arrears due the army by similar means. It was one of the great resources that sustained the war, not only by these States but by others. The ultimate fee (encumbered with the Indian right of occupancy) was in the crown previous to the Revolution, and in the States of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power and respected by the courts until extinguished, when the patentee took the unencumbered fee. So this court and the State courts have uniformly and often holden.' (13 Peters, 201.)"

The growing power and necessities of civilization and the waning numbers and needs of the Indians led to what may be noted as the second period of our Indian history, the commencement of which is marked by the administration of Andrew Jackson,—a period continuing from 1829 to 1871, which may be characterized as the period of compulsory emigration under the form of consent by voluntary treaty. These treaties were made under the same form and theory of law as those of the preceding period, and abound in provisions for annuities, rations, aid toward agriculture and education, and various other considerations given or promised as an equivalent for removal and for accepting a limited reservation for occupancy.

During this period, whatever cruelties may be chargeable to the executive and legislative course of the government, the courts have always continued to maintain, to the full extent of the judicial power,—which is necessarily limited to litigated cases coming before it,—the obligations of good faith as due from the government to the Indian people, and to declare those obligations not diminished, but rather emphasized, by the changed conditions of the time. The course of decision on this subject I cannot better indicate

than in the language of Mr. Justice Matthews, in delivering the opinion of the court in the case of the Choctaw Nation *v.* The United States (119 U. S. 1), where a claim of that tribe under the treaty of 1830 and subsequent dealings, which had been disallowed by the Court of Claims, was brought before the Supreme Court by appeal, and there sustained. He says :—

“ The United States is a sovereign nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its government is limited only by its own Constitution, and the nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative powers.

“ As was said by this court recently in the case of the United States against Kagama (118 U.S. 375, 383) : ‘ These Indian tribes *are* the wards of the nation ; they are communities *dependent* on the United States ; dependent largely for their daily food ; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection ; because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, by Congress, and by this court, whenever the question has arisen.’

“ It had accordingly been said in the case of Worcester *v.* The State of Georgia (6 Peters, 582) : ‘ The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter

sense. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.'

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

"The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations."

During this second period, however, the power of the *Executive* directly or indirectly to control the Indians by keeping them upon the reservation, and, so far as necessary for the interests of the government, maintaining order there, was fully recognized and established; and this stage of progress naturally led to what we may indicate as the third period, continuing from 1871 to 1886-7,—the period of confinement on reservations under executive control. The commencement of this period is marked by the statute of 1871 (U. S. R. S. section 2079) putting an end to the power of the *Executive* to make treaties with Indian tribes; and the consummation of the period in 1886 is marked by the final and conclusive establishment of the *Legislative* power over Indians as individuals, by the decision of the Supreme Court of the United States in the case already mentioned of the United States *v. Kagama*. It was there held in effect that it is competent for the United States to make a criminal code for Indians upon their reservations; and by parity of reasoning it is equally true that the United States may pre-

scribe a system of civil law for them. The point immediately in question was the validity of the act of March 3, 1885, section 9 (33 U. S. Stat. at L. 385), punishing murder committed by one Indian upon another on a reservation within a State. It was held that while the government of the United States has recognized in the Indian tribes heretofore a state of semi-independence and pillage, it has the right and authority, instead of controlling them by treaties, to govern them by acts of Congress, because they are within the geographical limits of the United States, and are necessarily subject to the laws which Congress may enact for their protection and for the protection of the people with whom they come in contact. And that the States have no such power over them as long as they maintain their tribal relation; for they owe no allegiance to a State within which their reservation may be established, and the State gives them no protection.

The results thus reached introduced the period which we are now entering, which we may designate as the period of fully recognized legislative and judicial power over the Indians as individuals, a period which has been fitly commenced by the several bills promoted by Senator Dawes, notably the bill for the allotment of lands in severalty. During this period, therefore, we already see, and are more fully to see, the Indians subjected to legislation; allowed and even required to accept ownership of land in severalty in lieu of tribal occupancy; granted the privileges of citizenship; and, whether they will accept those privileges or no, subjected to some, at least, of the burdens of citizenship. Many practical questions of difficulty will doubtless present themselves in reconciling citizenship and individual title with the restrictions of the surviving agency régime. But the principles which the beginning of the present period sees in operation must sooner or later put an end to that régime; and the ultimate objective point to which all efforts for progress should be directed is to fix upon the Indian the same personal, legal, and political status which is common to all other inhabitants.

To promote this result is the object of the bill entitled "An Act to establish courts for the Indian on the various reservations, and to extend the protection of the law of the States and Territories over all Indians, and for other purposes," now before the United

States Senate, — a bill deservedly known as the Thayer Bill, from the fact that its original suggestion and its outline and the maturing of its provisions in detail are chiefly due to the labors of Professor James B. Thayer, of the Harvard Law School.

In the present situation to which the course of events just described in outline has led, there are immense areas of land within the United States, belonging to us as a nation, and inhabited by a considerable population, which are now in a condition of lawlessness, mitigated only by arbitrary power. The act of 1885, already referred to, and several other recent statutes, have begun to create exceptions to this statement; but with very slight qualifications in view of such exceptions, it remains true that the most thorough-going anarchist may find the state of society which he desires to establish already in existence upon the reservations. If justice to the Indians would allow it, banishment to a reservation might be the most fitting punishment for a convicted anarchist.

If the numbers or the property of Indians were decreasing, it might be well to consider whether time might not be trusted to put an end to the shameful condition of lawlessness which the government is now maintaining, and, for the lack of proper legislation, is compelled to maintain. But the most careful investigations recently made show that the Indians are increasing in numbers; and a very slight familiarity with the subject will satisfy any one that the property rights of Indians and the pecuniary value of those rights are increasing very rapidly. So far from being "a vanishing subject," the necessity of law for the Indians is one steadily growing, in a geometrical ratio, and it is growing in importance for the whites as well as for the Indians.

Difficulties inherent in the subject will undoubtedly embarrass any attempt to supply this imperative want. The extent of territory and the comparative sparseness of population make the administration of civil or criminal justice expensive; the ignorance of civilized usages and forms of procedure, under which such a people must labor when first subjected to civilized justice, and the antipathies of race and the animosities of warfare, must deprive trial by jury of much of the effectiveness and the confidence necessary to its usefulness; and, perhaps still more serious than these difficulties, the exemption from taxation for many years to come accorded to lands owned by Indians in severalty, while intended to protect

them from fraud and improvidence in the earlier years of citizenship, makes it impracticable to require Indians to do their part in the ordinary methods of local government for the maintenance of courts and police, the establishment of highways and schools, or any other incidents of local self-government. These and similar features of the present status of the Indian seem imperatively to require some special provision for the administration of civil and criminal justice during the period which must elapse before he can be left to stand upon the same footing with other inhabitants of the State or Territory in which he may be.

This period must necessarily be considerable. It will take a considerable number of years to complete the process of optional allotments by which Indians are made citizens. Additional time will be needed for compulsory allotments. After allotments are made, a quarter of a century must be allowed before the lands can all be subjected to taxation, and, therefore, before the State and Territorial courts can be expected to bear the burden of administering justice to Indians and whites without distinction.

It is to the necessities of justice during this period that the bill addresses itself.

The clauses of the Dawes Bill as to the citizenship and civil rights of Indians are as follows (24 U. S. Stat. at L. 390, section 6, act of February 8, 1887, ch. 119):—

“Upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians, to whom allotments have been made, shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has

been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian or tribal or other property."

It is the object of the first clause of the Thayer Bill to add to the grant of citizenship secured by the Dawes Bill an immediate guarantee to all Indians not citizens, and whether residing on or off a reservation, of the full protection of the law, and to enable them to sue and be sued in all courts, and make contracts and engage in any trade or business, subject, however, to such reasonable restraint as is necessary to maintain order upon the reservation while the reservation system may continue. This seems to be an important and immediately feasible step towards putting the Indians as soon as possible under the same laws as the whites.

The second section is intended to provide qualification which in practice is found necessary, upon the strict rule of the Dawes Bill, that Indian contracts relating to their lands shall not be valid. As the law stands, if an Indian having accepted an allotment becomes aged or unable to work, or dies leaving infant heirs, his land cannot lawfully be leased nor any contract made to secure the value of its use or occupation.

The third object of the bill, declared by section 3, is the immediate extension over every reservation of the civil and criminal laws of the State or Territory in which it is situated, with saving clauses deemed necessary to provide against the contingency of local legislation unfavorable to Indians. This extension of law over the now lawless domain is the corner-stone of the bill. The previous provisions are incidental, connecting what has already been enacted with this great and vital declaration that hereafter no Indian and no part of the territory of the United States shall be deemed to be without the law.

Inasmuch as the considerations already explained render it utterly impracticable for a long time to come to rely upon State or Territorial courts for administering the law among these now lawless people, the next clauses of the bill provide for the creation of commissioners' courts, to have jurisdiction in all cases, civil and criminal, not capital, between Indians, or Indians on the one side and whites upon the other, or in which Indians are concerned as prosecutors or accused, and to have jurisdiction, also, of dece-

dents' estates, trustees, and guardians. These provisions are founded on the obvious expectation that the creation of property rights in Indians and the right of contract will necessarily lead, on a considerable scale, as it has already begun to do, to the same questions and differences requiring judicial adjustment which civilized life always involves.

It is an axiom in our free government that the existence of remedies is essential to the enjoyment of rights ; and nothing is clearer in the problem of the future of the Indians than that adequate means, accessible and comparatively inexpensive to them, for the peaceable adjustment of questions of property, contract, and domestic relations, are absolutely essential in order to foster and promote their civilization and good citizenship. Any suggestions which can render such a system of tribunals more simple, more easily accessible, more efficacious, and more inexpensive will doubtless be welcome ; but the complexity or expensiveness of a system of tribunals for such sparse and ignorant communities of people of hitherto lawless habits is not to be measured by comparing it with the inexpensive justices' courts which a New England town maintains by self-imposed taxes. It is to be measured by comparing it with the standing army now necessary, every man of which, in the Indian country, costs, by official computation, \$1,000 a year.

Section 8 provides for the appointment of committing magistrates for each reservation, exercising powers in aid of the jurisdiction of the courts mentioned in the previous clauses.

Inasmuch as the powers of courts of special and limited jurisdiction are strictly construed, and do not, without express authority, include the inherent powers of courts of general jurisdiction, it seems wise to provide expressly that these courts may exercise the power which a court of equity has always had, to allow a person, from any cause incompetent to protect his own rights, to appear by next friend ; and in view of the great proportion of cases in which incompetency of Indians would render a similar safeguard necessary to secure justice, and the expense of providing for separate appointments in every case, provision is made by section 9 for a standing next friend, to be paid by the government, and to act as a next friend in a court of equity does, on behalf of any Indian needing such assistance.

It would seem as if a statement of these provisions, in view of the situation, sufficiently manifests their general wisdom and necessity. No enlargement of the arbitrary powers of the Indian agent can meet the case, no extension of the jurisdiction of State or Territorial courts can do so, while the great body of Indian lands are exempted from taxation. The only alternative presented is between immediate provision at the expense of the United States for the accessible administration of justice according to local law, or according to a federal code to be provided for the purpose upon all the reservations, or, on the other hand, the continued sanction, by our government, of lawlessness and anarchy over extended Territories which belong to us, and among a people who are the wards of the nation, and for whose government according to civilized methods the nation is fully clothed with power.

Austin Abbott.

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"THE decision of the Court of Appeal in *Badeley v. Consolidated Bank*, 38 Ch. Div. 238, is or ought to be the last nail in the coffin of the old doctrine that participation in profits is anything more than evidence — not different in rank from any other evidence — that the partaker is a partner. Sharing profits is evidence of partnership, and may be ample evidence. But where it occurs only as one term or incident, we are not to take it first by itself, and say that it raises a presumption of partnership, and that a partnership there must be unless this presumption is specifically negated by some other clause or circumstance. The transaction must be judged and regarded as a whole." 4 Law Quart. Rev. p. 482.

WE note an apparent error at p. 161 (2d edition) of Mr. Dicey's "Lectures on the Law of the Constitution." In speaking on the conservatism of federalism he says: "The principle that legislation ought not to impair obligation of contracts has governed the whole course of American opinion," and states that had the English courts recognized the inviolability of the obligation of contracts in the same way as the American courts have done, the Irish Land Act, the Irish Church Act (1869), and the reformation of the Universities would have been considered unconstitutional. Mr. Dicey seems to understand that there is a limitation of the sort referred to on the power of our federal government. That this is not the case appears from the language of the Constitution itself, and also from the following authorities: *Buckner v. Street*, 1 Dillon (Circ. Ct.), 248; and *Hepburn v. Griswold*, 8 Wall. 637, in which it is said: "But while the Constitution forbids the States to pass such laws (viz., laws impairing the obligation of contracts), it does not forbid Congress." See also 8 Am. L. Rev. pp. 194-196.

THE number of students registered up to date in the Law School is 220. Of these, 27 are third year, 67 second year, 74 first year, and 52 special.

The new students are 105 in number, and come from the following States: Mass., 46; N. Y., 11; Ill., 6; Penn., 5; Ohio, 4; Me., 3; Cal., 3; Ind., 3; Md., Ky., N. J., Wis., Conn., and Mich., 2 each; Tenn., W. Va., Vt., Del., La., R. I., W. T., and Mexico, 1 each. Seventy-four have college degrees: Harvard, 47; Mass. Inst. Tech., Tufts, Amherst, and Yale, 3 each. One each from Univ. of Mich.,

Dartmouth, Brown, Colby Univ., Notre Dame, Kenyon, Ky. Mill. Inst., Cambridge Univ., Hanover, Princeton, Centre Coll., Univ. of Cinn., Wesleyan, Cornell, and Norwich Univ.

Compared with the number of students registered in October of last year (1 HARV. LAW REV. 145), these figures show an increase of 18 in the total number, and a decrease of 6 in the number of new students, which would indicate that a greater proportion now remain to complete the entire course. The total number of students registered during all of last year was 215, or 5 less than the number already registered this year.

The proportion of the new men who are college graduates is slightly increased.

In the recent English case of *Reg. v. Serné*, 16 Cox C. C. 311, Stephen, J., in a dictum, expresses decided distrust of the old common-law doctrine laid down by Lord Coke. that the accidental killing of a person through an act done with an intent to commit felony—as, for example, the shooting at a fowl with intent to kill it—is murder. He doubts whether that is “really the law,” and whether it would be followed by the courts to-day, and says: “Instead of saying that any act done with intent to commit a felony, and which causes death, amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder. As an illustration of this, suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder.” “The Law Quarterly Review,”¹ in commenting upon this case, says: “It is very desirable that the criminal law should not be at variance with the moral sense of the community. Doubting is a very convenient first step towards getting rid of archaic portions of the law.” It is to be hoped that this doubting process will continue until the common law is brought squarely into conformity with the doctrine suggested by Mr. Justice Stephen.

“The Law Quarterly” also points out that, as the doctrine now stands, “the books of authority are not even consistent in absurdity on this point;” for if A fires a pistol at B under such provocation that if he killed B it would be only manslaughter, and the bullet strikes and kills X, this is held to be only manslaughter, although by Coke’s rule it is clearly murder. This criticism, however, apparently overlooks the fact that this inconsistency would not be obviated by the adoption of Mr. Justice Stephen’s rule. The killing of X would be, in theory, as clearly murder by his rule as by that of Lord Coke, and the present holding of the courts as inconsistent therewith.

THE Governor of Kansas was recently reported to have made an interesting innovation in the use of the pardoning power by granting a pardon to a wife-murderer on the condition that he abstain in the future from the use of intoxicating liquors, relying, it is said, upon an Iowa decision holding such a pardon valid. Additional authority is also to be found in a dictum in the case of *U. S. v. Wilson*,² quoted in 1 HARV. LAW REV. 244, in which Marshall, C. J., in support of the

¹ Vol. 4, p. 489.

² 7 Pet. 150.

doctrine that a pardon is not valid until accepted, said: "A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment."

There seems to be little doubt that a condition precedent may validly be attached to the granting of a pardon; that is, for example, that a final pardon can be granted on condition that the criminal promises never to use intoxicating liquors again. Of course, in such case, if he should subsequently break his promise, he would incur no penalty therefor. Can the condition also be made in the form of a condition subsequent; that is, can a pardon be granted, analogous to a continuing respite, to hold good so long as the criminal does not, in fact, drink? It has been somewhat ingeniously suggested that in this case the prisoner, on drinking, would not be hung for the murder, which had been pardoned, but for the drinking, or that, in other words, the governor is thereby given power to make intoxication a capital offence. This criticism, however, overlooks the fact that the original crime has never been pardoned, but the punishment has merely been suspended on a certain condition, on the breaking of which the original judgment revives in full force.

On the whole, the more reasonable view would seem to be that such a pardon, with condition subsequent, is invalid, and that when once given upon whatever condition, the pardon should be final. The position of a condemned murderer, turned loose upon the community, subject to reimprisonment and execution in the event of drinking liquor, would be anomalous and absurd.

THE Supreme Court of Washington Territory has just given an interesting decision in the case of *Bloomer v. Todd*, reported in 38 Alb. L. Jour. 288. It seems that, by a recent territorial act, the right of suffrage was extended to women. Under that act the plaintiff, a woman, tried to vote in a city election within the Territory; but her ballot was refused by the election judges, and she brought suit against them. The defendants demurred to her complaint, and the demurrer was sustained in the District Court. The plaintiff appealed to the Supreme Court of the Territory, who sustained the former judgment on the ground that the territorial act was void as being in conflict with § 5506 of the United States Revised Statutes, providing that "the qualifications of voters and of holding office . . . shall be such as shall be prescribed by the Legislative Assembly: provided, that the right of suffrage and of holding office shall be exercised only by *citizens* of the United States above the age of twenty-one." The basis of the decision was that by "citizens" was meant only *male* citizens, since that was all that the framers of the statute had in mind when they drew it up.

In view, however, of the fact that there is a definition of the word "citizen" in an amendment to the U. S. Constitution, which negatives any such limited meaning, the decision would seem to be wrong. The Fourteenth Amendment provides that "*all persons* born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside." Women clearly come within this definition of citizens. The amendment having thus given a legal meaning to the word "citizen," the presumption should be that it is used in that sense. Although this definition was

given after the word had been used in the Constitution, still it was confessedly intended to be an explanation applicable to the Constitution, and to the U. S. Statutes then in existence; still more would it seem to apply to the interpretation of statutes passed by Congress subsequent to the adoption of the Fourteenth Amendment.

LORD CHANCELLOR HALSBURY, in the recent House of Lords case of *Leader v. Duffey*, 13 App. Cas. 294, at 301, uttered a vigorous protest, by way of dictum, against "rules of construction" for the interpretation of written instruments. He says: "All these refinements and nice distinctions of words appear to me to be inconsistent with the modern view — which is, I think, in accordance with reason and common sense — that, whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. . . . But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption, to bend the language in favor of the assumption so made."

A "rule of construction" is not, as was pointed out by Mr. Hawkins,¹ a rule which gives to certain words a certain definite meaning, entirely independent of intention, as, for example, the rule in *Shelley's Case*, which is a rule of substantive law; it is a rule "determining the construction which the courts are bound, *in the absence of a sufficiently declared intention to the contrary*, to put upon particular words," giving to those words a certain *prima facie* meaning, but always containing the saving clause, "unless a contrary intention appear." That is to say, a "rule of construction" is a rule of presumption, giving to certain words a *prima facie* meaning, which is binding upon judge and jury until contradictory evidence, and, in some cases, a certain amount of contradictory evidence, has been introduced to show that another meaning was intended.

In regard to these rebuttable presumptions the Lord Chancellor seems to think that such is the danger that judges will bend the other evidence of intended meaning to fall in with the presumed meaning, that it would be better to abolish these presumptions altogether. The dictum can scarcely be supported from this point of view, these presumed meanings being generally based upon motives of policy and upon what experience has shown to be a probability in fact, in regard to the intention of parties ordinarily using such words. They not only furnish a convenient starting-point for ascertaining the intended meaning, but they rest upon such a basis of policy and of probable fact that they should be conclusive in the absence of conflicting evidence.

The dictum, however, is valuable, in so far as it points out the danger of twisting the other evidence of intention to accord with the presumption, and calls to mind the often-forgotten fact that when evidence of a contrary intention has been introduced, the presumed meaning falls to the ground, and the meaning is to be ascertained from *all* the evidence of intention in the case, the presumed meaning having no greater weight as evidence of intention than that to which it is entitled by the evidentiary force of the probability upon which it rests,

¹ Hawkins on Construction of Wills, Sword's ed., Preface, p. v.

and the logical inference to be drawn therefrom. [See Chamberlayne's Ed. of Best on Evidence, p. 298, note, 1 A (b).] The temptation for judges to give these presumed meanings, when brought in conflict with other evidence, far greater evidentiary force than that to which they are entitled from their intrinsic probability, is a danger which needs to be guarded against. A modification of this general statement is, of course, necessary for those "rules of construction," as, for example, the rule that a gift to a testator's children means to his legitimate children only, which, resting not only upon the basis of inherent probability, but also upon special motives of policy, cannot be weighed in evidence, are held to be *strong presumptions*, and are presumed to be true until enough conflicting evidence is introduced, *clearly* to establish that they are not true.

As indications of the general tendency of modern law, in other matters than the construction of instruments, either to destroy entirely these rebuttable presumptions for the ascertaining of the intention of the parties, or to attach to them less evidentiary force, may be mentioned the fate of the old doctrine as to the presumption of partnership arising from a participation in profits, already referred to in a preceding note. In England, participation in profits now seems to raise no presumption of partnership whatever:¹ in the United States the amount of evidence necessary to overthrow it has been much diminished. So, too, may be instanced the growing discredit which has fallen upon the doctrine that in sales of personal property the fact that the price of the goods, otherwise in a deliverable condition, remains to be fixed by weighing, measuring, or numbering, establishes a presumption that the title does not pass until the act of weighing, measuring, or numbering be performed. This has fallen from an almost irrebuttable presumption, to be regarded either as establishing no presumption at all, or else a presumption which can be overthrown by slight evidence of contrary intention.²

THE case of *Dorr v. Lovering*, 19 N. E. Rep. 224, decided by the Supreme Court of Massachusetts on Oct. 22d, is an important decision, overruling *Lovering v. Lovering*, 129 Mass. 97, and bringing the Massachusetts courts again in line with the proposition: "that when, on a gift to a class, the number of shares is definitely fixed within the time required by the Rule against Perpetuities, the question of remoteness is to be considered with reference to each share separately." Gray on Perpetuities, p. 263.

We make the following extracts from the opinion, which was delivered by Morton, C. J. The italics are ours.

"The thirteenth article of the will of Joseph Lovering devises certain real estate to trustees upon the following trusts: to pay the net rents and profits to Nancy Gay, a daughter of the testator, during her life; and upon the decease of said Nancy to pay the net income to her children during the lives of said children; . . . and 'as said Nancy's children shall successively decease, a proportion of said estate or the

¹ *Cox v. Hickman*, 8 Il. L. Cas. 268; s. c. Ames' Cas. Partnership, 47; *Mollwo, Marsh & Co. v. Court of Wards*, 4 Pr. Coun. App. 419; s. c. Ames' Cas. Part. 79; *Badeley v. Consolidated Bank*, 38 Ch. D. 35.

² *Logan v. LeMesurier*, 6 Moore Pr. Coun. Cas. 116; s. c. Langdell's Sel. Cas. Sales, p. 681; *Turley v. Bates*, 2 H. & C. 200; s. c. Langd. Cas. Sales, 692; *Martineau v. Kitching*, L. R. 7 Q. B. 436, at 449; *Terr v. Wheeler*, 25 N. Y. 520; s. c. Langd. Cas. Sales, 706; *Groat v. Gile*, 51 N. Y. 431; *Burrows v. Whittaker*, 71 N. Y. 291.

proceeds are to be conveyed and distributed to and among the respective heirs-at-law of each child so deceasing, said Nancy's grandchildren to take in right of representation of their deceased parents.'

"This clause of the will has been twice before the court. In *Lovering v. Worthington*, 106 Mass. 86, it was held that the limitation of life estates to the children of Nancy Gay were not void for remoteness.

"In *Lovering v. Lovering*, 129 Mass. 97, the precise question now raised was decided. It was held that the limitations over to the heirs of George H. Gay, a son of Nancy, was void for remoteness. But the only question argued in that case was whether the devise of life estate to the children of Nancy Gay opened to let in children born after the death of the testator. The counsel for the grandchildren conceded that if after-born children were included in the devise, the limitations over to the heirs of the children of Nancy Gay was void for remoteness. The court, therefore, did not discuss the question, but, accepting the concession of the counsel, considered only the question argued by him.

"Under these circumstances we feel bound to consider the question now raised as if it were a new question.

"The general rule is well settled that in judging of the question of remoteness of an executory devise we must take our stand at the death of the testator, and that such devise is void unless it takes effect *ex necessitate* and in every possible contingency within the period of a life in being and twenty-one years afterwards. *Hall v. Hall*, 123 Mass. 120, and cases cited.

"The case (at bar) falls within the decision in *Hills v. Simonds*, 125 Mass. 536, . . . (in which) the case was presented of a devise of a life estate to the testator's son, with a limitation over of life estates to certain described nephews and nieces (*i.e.*, the children of certain brothers and sisters), and with further limitations over . . . of the particular and separate share of each nephew and niece to his or her children or legal representatives. . . . Assuming that the devise to nephews and nieces would open to let in after-born nephews and nieces, yet the share which each is to take must be ascertained at the end of lives in being at the death of the testator. . . . We think it was correctly held that the ultimate limitations over which applied to the respective shares of the nephews and nieces *who were living at the death of the testator* were not void for remoteness, as the remotest period at which such devises over must take effect is the end of the respective lives of such nephews and nieces.

"We have carefully reconsidered this case, because, as we have before stated, the case at bar cannot be distinguished from it. Mrs. Nancy Gay had eight children living at the death of the testator. We will suppose, for the purpose of the discussion, that she had a son born after the testator's death. . . .

"It has already been decided that, whether there are after-born children or not, the devise of life estates to the children of Nancy Gay is clearly valid. But upon the death of Nancy Gay the precise share of each child is ascertained and determined. . . . The will provides that, . . . 'as said Nancy's children shall successively decease, a proportion of the said estate, or the proceeds, are to be conveyed or distributed to and among the respective heirs-at-law of such child so deceasing, said Nancy's grandchildren to take in right of representation of their deceased parents.' This provision . . . clearly means that, upon the death

of each life tenant his share shall be divided among his heirs-at-law, and so on upon each successive death of the children of Nancy Gay. It contemplates that, at the death of Nancy Gay, each of her children is to have a separate and independent share, and it looks to separate and independent division of each share, at different times and to different persons. As each child dies his heirs are to take. . . . The intention of the testator cannot be carried out except by regarding this provision as separate and distinct devises to different classes, which take effect at different times, upon the respective deaths of the life tenants. The legal heirs of each child, upon his death, take his share of the estate, and *as the devise to the heirs takes effect at the death of their ancestor who had the life estate, it follows that in the case of all the children who were living at the death of the testator the devise over is not void for remoteness. In the case supposed of the after-born son, the devise over would be invalid, but this would not affect the distinct devises in favor of the heirs of his brothers and sisters; because the estates devised to them must vest within the period prescribed by law.* We are compelled to the conclusion that the concession of counsel, and the decision of the court in *Lovering v. Lovering, ubi supra*, to the effect that the gifts over to the heirs-at-law of the children of Nancy Gay were void for remoteness, were erroneous. *Catlin v. Brown*, 11 Hare, 372; *Griffith v. Pownall*, 13 Sim. 393; *Wilkinson v. Duncan*, 30 Beav. 111; *Storrs v. Benbow*, 3 De G., M. & G. 390; *Pearks v. Moseley*, 5 App. Cas. 714.

"The result of this is that the heirs-at-law of Ann L. Gay, are entitled, under the thirteenth clause of the will, to the property in which she had a life interest."

For a full discussion of the principle involved in this case, and of the authorities *pro* and *con*, see Gray on Perpetuities, pp. 260-267. Mr. Gray was of the counsel in this case, representing the heirs of Ann L. Gay.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ASSUMPSIT—WORK AND LABOR BY WIFE FOR SUPPOSED HUSBAND—MISTAKE OF FACT.—A woman married a man and lived with him till his death. She afterwards learned that he had a former wife, still living, from whom he had not been divorced. *Held*, that she could not recover from his administrator for work and labor in keeping house for him during his life. *Cooper v. Cooper*, 17 N. E. Rep. 892 (Mass.); s. c. 16 Mass. Law Rep. (No. 35) 15.

This case is probably law. Compare cases where a negro has failed to recover the value of services rendered on the supposition that he was a slave. *Alfred v. Marquis of Fitzjames*, Esp. 3; *Livingston v. Ackeston*, 5 Cowen, 531; *Negro Franklin v. Waters*, 8 Gill, 322. But see *contra*, *Negro Peter v. Steel*, 3 Yeates, 250; *Jarrat v. Jarrat*, 2 Gilman, 1, *semble*; *Kinney v. Cook*, 3 Seammon, 232, *semble*.

The argument in these cases appears to be that the service is gratuitous, and that there can be, consequently, no implied obligation to pay for it. But there seems to be no sound objection to treating them as cases of mistake of fact, where the plaintiff recovers the reasonable worth of something given or done because of a supposed legal obligation. However, it is not quite so clear that a

wife performs the services in discharge of a legal obligation, to her husband, as a sense of moral duty would probably induce her to perform them. Still it may be said that the services would never have been performed but for her supposed legal status as a wife.

BANKS AND BANKING — INSOLVENCY — DRAFT FOR COLLECTION.—A draft sent to a bank specially indorsed for collection was paid by the drawee, by check, which the bank collected through the clearing-house. A memorandum was placed with the bank's cash to indicate that the proceeds of the draft were the property of the sender. The bank suspended payment the next morning, and the receiver credited such proceeds to the sender of the draft on the books of the bank. *Held*, that the fund was not so mingled that it could not be traced and identified, and that the sender could recover the same. *First Nat. Bank of Montgomery v. Armstrong*, 36 Fed. Rep. 59 (Ohio).

For a further discussion of the doctrine above laid down see *First Nat. Bank of Circleville v. Bank of Morroe*, 33 Fed. Rep. 409 (N. Y.); and *In re Armstrong*, id. 405 (Ohio), digested in 2 HARV. L. REV. 48.

BILLS AND NOTES — PROTEST NOTICE WITHIN POST-OFFICE LIMITS.—An indorser of a note, whose residence and place of business is just outside of the corporate limits of the city where the note is protested, but within a short distance of the post-office of the city, is entitled to personal service of notice of protest; and a drop-letter sent through the post-office, there being no mail-carriers, is insufficient. *Brown v. Bank of Abingdon*, 7 S. E. Rep. 357 (Va.).

COMMON CARRIER — RAILWAY — EJECTION OF PASSENGER FOR FAILURE TO PRODUCE TICKET.—When a plaintiff, who has bought a ticket on defendants' railway, incorporating by reference to the defendants' by-laws a condition that every passenger shall deliver up his ticket when required or shall pay full fare, having lost his ticket, refuses to pay the fare, and is forcibly removed from the train by the defendants' servants, he cannot recover from the defendant in an action of assault. Such a ticket is not a revocable license to plaintiff to go on defendants' land, but is a contract by the defendants that on the plaintiff's paying for the ticket they will carry him between the specified points, and contains no condition, either express or implied in fact, giving defendants a right to eject him on failure to produce ticket. The plaintiff, having paid for his ticket, was lawfully on the premises of the defendants, whose only remedy against him was in action for breach of the conditional agreement to pay fare on failure to produce ticket. *Butler v. M. S. & L. R'y Co.*, 21 Q. B. D. 207; s. c. 38 Alb. L. J. 191.

It is, in general, held that one who attempts to ride on a train without having bought a proper ticket is a mere trespasser, and may be ejected by the company's servants on refusal to pay fare. *Wyman v. R'y Co.*, 25 N. W. Rep. 349 (Minn.); *Godfrey v. R'y Co.*, 18 N. E. Rep. 61 (Ind.). But see *Hall v. R'y Co.*, 5 S. W. Rep. 623 (S. C.), which seems to be *contra*.

There seems to be no previous English authority on the precise point involved in *Butler v. R'y Co.*, as to the rights of a passenger who has bought a ticket but subsequently lost it. The tendency of American law, however, seems to be, in general, *contra*. *Townshend v. R'y Co.*, 56 N. Y. 295; *Shelton v. R'y Co.*, 29 Ohio St. 214, and *Jardine v. Crowell*, 14 Atl. Rep. 550 (N. J.). These cases are, however, imperfectly reported; two of them, at least, may, perhaps, be explained on the ground that a regulation of the company, which seems to be considered as an implied condition in the ticket, expressly required the conductor to eject a passenger who failed to produce ticket or pay fare. In the absence of any such express stipulation or regulation, the better view would seem to be that of the English case. A passenger who has lost his ticket cannot be considered a trespasser. The company contracted to carry him in consideration of his payment of money, and the promise to pay fare on failure to produce ticket when required; the consideration was not the doing of this act, but the promise to do it. Having thus given consideration for the company's agreement to carry him, he can insist upon its fulfilment, and is not a trespasser on their land; the breach of his conditional promise only gives the company a right of action against him.

See *Hall v. R'y Co.*, 15 Fed. Rep. 57, and note, for a discussion of the general subject of rights of passengers.

CONSTITUTIONAL LAW — COMPELLING DEFENDANT TO BE A WITNESS AGAINST HIMSELF.—To order the defendant in a trial for murder to stand up, during the trial, for identification by one of the witnesses, is not a violation of a constitutional provision that "no person shall be compelled in any criminal case to be a witness against himself." *People v. Goldenson*, 19 Pac. Rep. 161 (Cal.).

CONSTITUTIONAL LAW — POLICE POWER — PHYSICIAN'S LICENSE. — *Semble*, that an act of a State Legislature giving a State board of examiners the power to revoke a physician's license for "unprofessional conduct" is a valid and constitutional exercise of the police power of the State; and that the revocation of a physician's license from having advertised himself in a newspaper and printed pamphlet as a specialist in certain diseases is a valid and constitutional exercise of the discretion vested in the board of examiners. *Ex parte McNulty*, 19 Pac. Rep. 237 (Cal.).

Thornton, J., dissented from both of these propositions, saying, as to the exercise of discretion by the board of examiners: "As well might the board declare that wearing any other hat than one of a white color, by a physician, should be unprofessional conduct."

If the officers to whom is intrusted the execution of a valid law, under cover of that law, by a wrongful exercise of the discretion vested in them, do acts in violation of the Constitution, those acts come within the prohibition of the Constitution. *Yick Wo v. Hopkins*, 118 U. S. 356, and the other cases therein cited.

Quare, whether a law is rendered invalid *in toto* because it offers an opportunity for such an unconstitutional exercise of authority by the officers to whom its execution is intrusted. The better view would seem to be that if, on a fair construction of the terms of the law, it does not seem intended to authorize or secure such an unconstitutional exercise of authority, it shall be construed as only authorizing a valid exercise of discretion, and to be constitutional; and any officer making an invalid exercise of his discretion shall be held guilty of an unconstitutional exercise of authority, not warranted by the law under which he assumes to act.

CONSTITUTIONAL LAW — SUITS AGAINST STATES. — A suit in a Federal court by a railroad company chartered in one State to restrain railroad commissioners of another State from putting in force a schedule of rates, is not a suit against a State, within the meaning of the Eleventh Amendment to the Constitution of the United States, providing that the judicial power of the United States shall not extend to suits against one of the States by citizens of another State. "In these matters, although in a certain sense the State is interested, as it is in all matters affecting the welfare and happiness of her people, yet it is interested only in a general sense, and not in that direct pecuniary sense which makes it, in the language of the law, the real party in interest." *Chicago & N. W. Ry Co. v. Dey*, 35 Fed. Rep. 866 (Iowa).

Whether a State is the actual party defendant in a suit, within the meaning of the Eleventh Amendment to the Constitution of the United States, is to be determined by a consideration of the nature of the case as presented by the whole record, and not, in every case, by a reference to the nominal parties of the record. *In re Ayers*, 123 U. S. 443.

CONVERSION—MEASURE OF DAMAGES. — Defendant carelessly, but not wilfully, cut timber trees belonging to plaintiff. *Held*, that the measure of damages in an action of trover is the value of the trees immediately after they were severed from the realty. *Beede v. Lamprey*, 15 Atl. Rep. 133 (N. H.).

This case is a departure from the earlier authorities which hold that the measure of damages is to be estimated on the value of the property at the time of action brought, if its identity has been preserved. The authorities are reviewed in the opinion of the court.

CONVERSION — SALE OF PLEDGE BY MISTAKE — DAMAGES. — When the pledgee of stock, given as collateral security, under an honest mistake, sells the same, and applies the proceeds to the payment of the debt with interest, *held*, that the highest price of the stock between the time of conversion and of bringing action cannot enter into the determination of the damages, which must be limited to the highest price within a reasonable time after the plaintiff learned of the conversion, *minus* the amount of the debt and interest. *Wright v. Bank of the Metropolis*, 18 N. E. Rep. 79 (N. Y.).

The principle that a plaintiff must so act as to make his damages as small as he reasonably can was applied in this case. It had already been decided in *Baker v. Drake*, 53 N. Y. 211, that, when the plaintiff was suing for the conversion of stock for which he had paid the broker but a small percentage of the value as a "margin," a duty rested on him to purchase in the market within a reasonable time after he knew of the conversion, in order to diminish his loss. The court intimated that no such duty would rest on a plaintiff who was complete owner of the stock, thus indicating a distinction between cases where the

plaintiff is merely speculating and those where he intends really to hold the stock as owner.

The case above repudiates that distinction. It is an illustration of the modern tendency to require a plaintiff so to act as to make his damages as small as he reasonably can, both in actions of tort (*Hogle v. R. R. Co.*, 28 Hun, 363) and of contract (*Parsons v. Sutton*, 66 N. Y. 92). See 1 Sedgwick on Damages (7th ed.), 166, note.

EVIDENCE — PRESUMPTION OF DEATH — SEVEN YEARS' ABSENCE. — Although a presumption of death arises at the end of a seven years' absence, there is no presumption of life during that period, or of the time of death; the time of death, when material, is a fact to be established by evidence. *Whitely v. Equitable Life Assur. Soc. of U. S.*, 39 N. W. Rep. 369 (Wis.).

For other cases overthrowing the old doctrine that there is a presumption of life until the end of the seven years, see *Bailey v. Briggs*, 97 U. S. 628, at 634, and note in Best's Evidence (Chamberlayne's ed.), p. 299.

HUSBAND AND WIFE — COMMUNITY PROPERTY — MORTGAGE AND RECONVEYANCE. — Where community property conveyed to secure the husband's debt is, upon payment of the debt, reconveyed to the wife upon a nominal consideration, it again becomes community property, as it was originally. *Ballew v. Casey*, 9 S. W. Rep. 189 (Tex.).

INSURANCE — DURATION OF "BINDING RECEIPT." — The plaintiff applied for insurance, and the agent, unable to determine what should be the premium until the property was rated, gave a "binding receipt," which certified that the company would hold good a specified amount of insurance until the policy could be delivered. No premium was ever paid, and nothing more was done about the matter until about ten months afterward, when a loss occurred. Held, that the "binding receipt" was a mere preliminary contract, and continued only for a reasonable time; and that ten months was not a reasonable time in case of a contract for one year. *Coe v. Washington F. & M. Ins. Co.*, 17 Ins. L. J. 717 (N. J. Circuit Court.)

LANDLORD AND TENANT — COVENANT AGAINST ANNOYANCE AND NUISANCE — HOSPITAL. — Although the use of leased premises as a hospital for the cure of diseases of the ear, etc., in which known infectious diseases are not treated, is not a breach of a covenant not to use the premises to the "nuisance" of adjoining residents, such a use not being a technical "nuisance," yet it is a breach of a covenant not to use the premises to the "annoyance" of adjoining residents, being such a use of the premises as seriously abridges their ordinary comfort of existence, and sensibly increases the possible danger from infection. *Heatley v. Benham*, 59 L. T. Rep. (N. S.) 25; s. c. 38 Alb. L. J. 321.

MISREPRESENTATION — ACTION OF DECEIT — LIABILITY OF DIRECTORS FOR MISSTATEMENT IN PROSPECTUS — MEASURE OF DAMAGES. — Directors of a tramway company, who issue a prospectus stating that under its act of incorporation the company has the right to use steam-power instead of horse-power, when in fact the company has only the right to use steam-power with the consent of the board of trade, which consent was afterwards refused, are liable, in an action of deceit, to a stockholder to whom this misstatement was a material inducement for taking shares in the company, to the extent of the actual loss which he sustained through depreciation in the value of the shares subsequent to his purchase. *Cotton, L. J.*: "Where a man makes a statement, to be acted upon by others, which is false, and which is known by him to be false, or is made by him recklessly or without caring whether it is true or false—that is, without any reasonable ground for believing it to be true—he is liable in an action of deceit at the suit of any one to whom it was addressed, or of any one of the class to whom it was addressed, and who was materially induced by the misstatements to do an act to his prejudice." *Peck v. Derry*, 59 L. T. Rep. (N. S.) 78; s. c. 38 Alb. L. J. 273.

This is a strong and important decision, insisting more strongly than has ever been done before on the necessity of strictest honesty in commercial dealings. It was also held in this case that a director who was not present at the meeting at which the issuing of the prospectus was authorized, but who afterwards received and circulated some copies of it, had adopted it, and was liable to the stockholder, although the copy seen by the stockholder had not been supplied by him.

NEGLECT — DAMAGES — KILLING OF MINOR CHILD. — A child four and one-half years old was run over and killed through the negligence of the driver of a loaded wagon. Held, that the father could recover all the probable, or even

possible, benefits which might have resulted to him from the whole future life of the child, modified by all the chances of failure and misfortune. *Birkett v. Knickerbocker Ice Co.*, 18 N. E. Rep. 108 (N. Y.).

The rule of damages is different in some jurisdictions. In Michigan, for example (*Cooper v. L. S. & M. S. R'y Co.*, 33 N. W. Rep. 306), the rule above given is severely criticised, and the damages are limited to the loss of probable services during the minority of the child, *minus* the probable expense to the parent. "Anything further is incapable of pecuniary estimate." So in Texas (*Brunswick v. White*, 8 S. W. Rep. 85) and in Pennsylvania (*Penn. College v. Nee*, 13 Atl. Rep. 841).

It should be noticed that the right to damages in these cases is statutory, and the measure is not exactly the same as in common-law actions of tort. While not mere injury to the feelings, but only pecuniary loss, actual or expectant, can be considered, still wide latitude is given under the statutes; but the New York case would seem to go too far. See Cooley on Torts, p. 270.

NEGLIGENCE — IMPUTED — DRIVER AND PASSENGER. — Plaintiff, while riding in a vehicle upon invitation of the owner, sustained an injury occasioned by a defect in the highway. *Held*, that the negligence of the driver which contributed to the injury could not be imputed to plaintiff. *Nisbet v. Town of Garner*, 39 N. W. Rep. 516 (Iowa).

In confirmation of this doctrine see the late English case of *Mills v. Armstrong*, 57 L. J. Rep. Q. B. 65, which overrules the well-known case of *Thorogood v. Bryan*, 8 C. B. 115. See also note, 2 HARV. L. REV. 140.

NEGLIGENCE — IMPUTED — PARENT AND CHILD. — An infant five years of age is not precluded from recovering damages for an injury which might have been avoided by the exercise of due care on the part of his parents. *Bisaillon v. Blood*, 15 Atl. Rep. 147 (N. H.).

The old doctrine imputing the negligence of a parent to the child is not fully sustained by the latest authorities. Thus it is said in *Huff v. Ames*, 19 N. W. Rep. 623, that "in an action for damages by an infant . . . the negligence of the parent or guardian is not to be considered or imputed to the infant." *Railway Co. v. Schuster*, 6 Atl. Rep. 269 (Pa.), *accord*. But see *Fitzgerald v. Railway Co.*, 13 N. W. Rep. 168 (Me.), and *Slater v. Railway Co.*, 32 N. W. Rep. 264 (Iowa), in which the old rule of imputed negligence is followed.

PLEDGE — SUBSEQUENT DELIVERY OF POSSESSION. — Where the borrower of money agrees to deliver to the lender, at a future time, certain goods as security therefor, on the subsequent delivery of the goods in pursuance of the contract the same legal results follow as if the goods had been delivered when the money was lent, and the "special property" in the goods passes at once to the lender. Although delivery of the goods is essential to the contract of pledge, that delivery need not be contemporaneous with the advance of the money. *Hilton v. Tucker*, 59 L. T. Rep. (N. S.) 172; s. c. 38 Alb. L. J. 333.

TELEGRAPH COMPANIES — LIABILITY FOR ACTS OF AGENT — FRAUDULENT MESSAGE. — Plaintiff, in response to a despatch which was sent over defendant's wires, and which apparently came from parties to whom he was in the habit of forwarding money, though, in fact, it was prepared and sent by the agent of defendant, forwarded to the supposed sender of the telegram fifteen hundred dollars in currency by the American Express Company. This money was intercepted by defendant's agent who sent the telegram, and who was also agent of the express company. *Held*, that the transmission of the forged despatch was the proximate cause of plaintiff's loss, and that the telegraph company was liable for the act of its servant. *McCord v. Western Union Tel. Co.*, 39 N. W. Rep. 315 (Minn.).

This seems to be a strange application of the doctrine of *respondet superior*. The telegraph agent, in preparing and sending the false despatch, certainly did not act in the capacity of agent, but wholly on his own account.

VENDOR'S LIEN — ASSIGNMENT OF NOTE AS COLLATERAL. — The personal lien existing in favor of the vendor of land for a note given for unpaid purchase-money is not lost by the mere assignment of the note as collateral security. *Cate v. Cate*, 9 S. W. Rep. 231 (Tenn.).

By the English authorities, which hold that the equity is not one personal to the vendor, the lien seems to be assignable (2 Dart's V. & P. 5th ed. 732; *Dryden v. Frost*, 3 Mylne & C. 670). The opposite view prevails generally in this country, but the above exception, which is rather apparent than real, has been made before in other States (Jones on Liens, § 1096).

REVIEWS.

THE CONFLICT OF JUDICIAL DECISIONS. By William H. Bailey. Baltimore: M. Curlander. 1 vol. 8vo. lxxxvii and 445 pages. 1888.

This book is based upon a good idea, namely, the endeavor to state in a compact form the views held in the different States of this country and in England upon the more important of the many undecided points of law upon which there is still conflict, with a full citation of authorities, arranged by States, and short notes and suggestions by the author. The subjects treated embrace such familiar topics as: Alteration of Instruments; Comparison of Handwriting; Sunday Contracts; Intensity of Proof; Limitations; Separate Estate of Married Women, and Railway Law; with about twice the number of less important subjects. The scheme of the work indicates its field of usefulness to the practitioner engaged in studying one of these doubtful questions, upon which the various authorities have hitherto been widely scattered and are now for the first time collected in one volume. It is also eminently useful in looking up the law of another State upon any one of these subjects. It seems to be, what the author trusts it may prove, "a time-saver in the search for the law."

The book, being based on so good an idea, is a fairly good book; it might be better. The execution of the idea is not equal to the idea itself.

The introductory notes and comments by the author are short, suggestive, and to the point. The foot-notes are, we regret to say, somewhat marred by such occasional specimens of quasi-wit as the following comment upon a case of Sunday contract: "This case operates as a warning to those who follow the habit of our great dead captain, in always buying their Sunday cigars the night before. The court, though, with a 'charity that passeth all understanding,' holds that an innkeeper, or, according to the fashionable American nomenclature, hotelist, may, in conjunction with his business, keep open a cigar stand on Sunday! As a smokist we admire, as a lawyer we hold our peace." Such wit, if wit it be, is decidedly out of place in a law-book designed for the use of practitioners.

This book is designed as an eminently practical book, if anything. Two or three criticisms should therefore be made upon its construction.

First: the index is poor. An extreme example of its sometimes erratic logical subdivisions is the fact that the relations of a crew to the master of a vessel is found indexed under the heading of "Railway Law." The question as to whether various employees are fellow-servants is scattered in a most confusing manner through this whole subject of "Railway Law," instead of being grouped under one subdivision of fellow-servants. Second: the arrangement of cases is singularly bad. There is no pretence of following chronological order, the cases in each State being thrown together in a haphazard way, which renders it necessary to read through the entire note in order to find the latest case on any subject. Third: it does not seem necessary to cite *every* case in each State upon any given point, as the author has done, making the book unnecessarily large. A little extra care expended by him in selecting the later cases which contain reference to

earlier cases in the same State, and citing these only, would render the book just as useful as at present, and certainly handier.

Two commendable practical features of the book are the discarding of the phrases *supra* and *infra* in the citation of cases, with the full citation of every case wherever necessary; and also the list which is given, of pivotal or leading cases.

The book, on the whole, contains much valuable matter, is based on a good idea, is full, accurate, and suggestive; the defects indicated, however, seriously mar its usefulness.

E. T. S.

A TREATISE ON THE LAW OF CORPORATIONS OTHER THAN MUNICIPAL. By Thomas W. Waterman. New York: Baker, Voorhis, & Co., 1888. 2 vols. 8vo.

Corporations have increased so rapidly in number and importance during the past twenty-five years, that a thorough knowledge of their origin and development is indispensable to the successful solution of the many difficult problems with which the corporation lawyer of to-day has to deal, and the legal profession as a whole must welcome the publication of a work which is the result of many years of labor and study upon this subject by so eminent a writer as Mr. Waterman.

The large and clear type of the book before us and the tasteful arrangement of its subject-matter create, at the first glance, a favorable impression on the reader. The text of the book has been carefully prepared, comparisons being made and distinctions drawn without any unnecessary or superfluous wording, leaving, in a large measure, case illustration to foot-notes. A table of cases and a good index give the book, in form, at least, an air of completeness.

The author begins with the definition of a corporation, and in that connection emphasizes the fact that a corporation must be considered not as an absolute fiction, but as a tangible fact, a legal person, having an existence separate and distinct from the persons composing it. Then follow the fundamental distinctions between a corporation and a partnership, which are clearly drawn, though the notion that "community of profit is the criterion by which to ascertain whether a contract is really one of partnership," sounds a trifle antiquated, founded as it is upon cases like *Waugh v. Carver*, 2 H. Bl. 235. There was but a shadow of this theory left after the decisions of *Cox v. Hickman*, 8 H. L. C. 268, and *Bullen v. Sharp*, L. R. 1 C. P. 86; and the doctrine is now wholly overthrown in England by the late case of *Badeley v. Consolidated Bank*, 38 Ch. Div. 238, referred to in the note department of this issue of the REVIEW.

In our small space it is impossible to review in detail all the valuable features of this work, but we would call attention to the chapters on "Subscriptions for assessments upon and transfer of stock," and "Corporate liability for wrongs," which are treated with special fulness. There is also much interesting historical matter in the book which is an invaluable aid to an intelligent understanding of the present law, e.g., the history of the corporate seal, which shows a gradual relaxation by the courts in applying the strict common-law rule, requiring all instruments executed by a corporation to be under seal.

We can heartily recommend this work to all who are interested in corporate law, not only because it is the latest exposition of the subject, but also for its intrinsic worth.

A. E. M.

A PRACTICAL TREATISE ON INSOLVENT CORPORATIONS, including the Liquidation, Reorganization, Forfeiture, Dissolution, and Winding-up of Corporations. By Frederick S. Wait. New York: Baker, Voorhis, & Co., 1888.

In this volume we have, as the author says in his preface, "the pioneer attempt to treat exclusively of principles, remedies, and proceedings having in view the liquidation and closing up of corporate organizations." The subject has, of course, been touched incidentally in the treatises on private corporations, and has received especial attention in Mr. Morawetz's book, but has never been accorded such full consideration as in the book before us. Some notion of the new ground covered may be gained from the fact that fully one-half of the large number of cases here cited do not appear in Morawetz. The powers and duties of receivers form a topic which has been hitherto almost utterly neglected, but which is here exhaustively treated, and constitutes perhaps the most valuable part of the book. Another new feature which will be acceptable to the practising lawyer is the consideration given to pleadings, complainants, and parties defendant.

The work is not a mere digest, nor is it merely a mouthpiece for the promulgation of the author's views. The author is in some instances, to be sure, content with a bare statement of cases where we could wish to have them discussed; but at the same time he does not hesitate to express his views vigorously enough when he deems a rule of law manifestly unjust. Notable instances of forcible statement may be found in §§ 6, 162, and 280-281, and indeed the work is remarkable throughout for its aptness of expression, its peculiarly happy choice of words. The book is brought down to date, as may be seen, for example in § 478, where is cited Mr. Stimson's article on "Trusts," which appeared in a recent number of the REVIEW.¹ W. F. B.

THE PRINCIPLES AND FORMS OF PRACTICE in Civil Action in Courts of Record under the Codes of Procedure. Adapted also to Common Law and Equity Practice. By Austin Abbott. New York: Baker, Voorhis, & Co., 1887 and 1888. Two volumes. 8vo. viii and 867, x and 1189 pages.

This work, as now completed, is not a new edition of the work well known under the title of Abbott's Forms, but differs somewhat from the earlier work both in scope and plan. In addition to the very large number of new forms which appear in the present work, there is prefixed to each class of forms a discussion of the general principles governing that particular class, a discussion sometimes covering many more pages than the forms themselves. The arrangement of the forms is excellently adapted to the needs of the practitioner, the order being that of the regular course of proceedings in a suit. While the work applies to New York in its technical details, it aims to give the code practice of the country.

A very valuable part of the second volume are the careful analyses of proceedings which it contains. Particularly admirable are the analyses of the various modes of trial, of the changes of parties, and the tabular views of the methods of discovery and of taking evidence.

It is very interesting to the student of the common law to note the

¹ 1 Harv. Law Rev. 132.

survival of substance amid the change of form. This work shows very clearly that not only does equity survive in name under the codes, but that chancery practice is, to a greater extent than is generally supposed, distinct both in its remedies and their application.

If it were thought advisable to add to the size of a work already so large, it certainly would increase its value to add an introductory chapter containing a general survey of the changes in practice wrought by the code procedure.

W. G. C.

SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY. By John Chipman Gray. Volume I. Cambridge: Charles W. Sever. 1888.

The purpose of this book is that it shall be, not a reference manual for practising lawyers, but a class-book for students. Its plan is due to the methods of teaching which are in vogue in this School, and which must, therefore, furnish the standard by which it is to be judged. Thus, to an attorney who expects a book modelled on Smith's Leading Cases, the total absence of head-notes will seem a serious defect; but in a book intended for scholars, who are to ascertain for themselves the point of law which each case involves, to insert the head-notes would plainly be to defeat the very object in view. The book will be mainly useful, then, in the lecture-room; but to one who has had the benefit of Prof. Gray's lectures, and who keeps his references, it will be helpful in later life as well. On the whole, however, a collection of cases like the one under consideration must stand or fall with the system of instruction of which it forms a part. Of the success of that system there can be no reasonable doubt.

This is the first volume of an intended series, of which the second volume is almost ready. It is to be hoped that the rest will be forthcoming soon.

E. V. A.

SHORTT ON INFORMATIONS (*Criminal and Quo Warranto*), MAN-DAMUS, AND PROHIBITION. American notes by Franklin Fiske Heard. 1888. Chas. H. Edson & Co., Boston.

This work treats of subjects that have been but little discussed in text-books, presumably for the reason that they are of a minor importance to the practising attorney. The English edition contains quite an exhaustive collection of the authorities there; but the duties and functions of English courts and English public officers differ so much in detail from our own, that it would be quite impossible to make such a work of much interest to lawyers in this country.

The American notes contain little that cannot be found in the Digests; they bear unmistakable signs of being prepared at short notice under contract, — a characteristic of many of the recent cheap editions of English text-books in this country.

C. M. L.

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THE WATUPPA POND CASES.

MOST of the New England rivers which furnish valuable water-power are fed at some point in their course by large ponds. Many of the smaller streams draw practically their whole supply from such sources. These ponds, owing to the purity of their water and their favorable location, are also peculiarly available for supplying cities and towns with water for domestic and other uses. Of the two hundred and twenty-two acts passed in Massachusetts prior to 1886, authorizing municipalities or other corporations to take water for the supply of cities or towns, many granted the right to take water from these large ponds. This diversion of the water for the purpose of supplying cities or towns reduces, of course, the flow in the ponds and the outlet streams, and in every such act a provision was inserted to secure compensation to persons injured by so taking the water, as in all other cases of the taking of property by right of eminent domain. The chief claims for damages made under these statutes have been on behalf of the owners of the water-power on the outlet streams.

In 1871 the Massachusetts Legislature authorized the city of Fall River to take from North Watuppa Pond, for domestic and other uses, fifteen hundred thousand gallons of water daily. North and South Watuppa Ponds are connected by a narrow passageway, and form together a body of water of some thirty-three hundred

acres. Through the Quequechan or Fall River, a stream of about two miles in length, these ponds empty into the tide water. In the last half-mile of its course the Quequechan has a fall of nearly one hundred and thirty feet, and is occupied by a succession of valuable mill privileges. The taking of the water of the ponds under the act of 1871 materially reduced the flow in the Quequechan, and heavy damages were assessed in favor of the mill-owners. When, in 1886, the city of Fall River had occasion to ask the Legislature for leave to take an additional supply of water from the ponds, the idea was conceived of avoiding the payment of compensation for injury to these mill-owners. The proposed bill purported to relieve the city from "liability to pay any other damages than the State itself would be legally liable to pay," provided that "parties holding in respect of said pond any privileges or grants heretofore made and liable to revocation or alteration by the State shall have no claim against said city in respect of water drawn under this grant," and annulled "any privileges heretofore enjoyed in respect of said pond," so far as inconsistent with the act. On the day before the close of the session, the bill, having passed both Houses, reached the Governor, who returned it to the Senate, where it originated, on the ground that it authorized the taking of private property without providing compensation. In the hurry of the last day of the session the bill was passed over the Governor's veto.¹ The city of Fall River at once proceeded to take additional water from the Watuppa Ponds, without making compensation to the mill-owners on the Quequechan, and suits were brought by them and by the Watuppa Reservoir Company (a corporation organized for the purpose of controlling and regulating the water in the ponds and on the stream) to restrain the city of Fall River from taking water under the act.²

By a majority of four to three,³ the Supreme Judicial Court of Massachusetts ordered that the bills be dismissed. All the judges apparently admitted that, according to the common law, the Legislature could not authorize the taking of the water of a pond without providing for compensation for damages done the riparian owners on the outlet stream by a diminution of its flow. But the

¹ Mass. St. 1886, c. 353.

² *Watuppa Reservoir Co. v. City of Fall River*; *Troy Cotton and Woollen Manufactory v. City of Fall River*. Supreme Judicial Court of Massachusetts, Oct. 29, 1888.

³ Morton, C. J., Devens, Field, and Holmes, JJ., against W. Allen, C. Allen, and Knowlton, JJ.

majority of the court were of the opinion that these cases were taken out of the general rule, because the North Watuppa is a "great pond," and governed by the provisions of the Massachusetts Colony Ordinance and Ancient Charter of 1641-7, which has become a part of the general law of Massachusetts, and provides as follows :—

LIBERTIES COMMON.

1. It is ordered, by this court decreed and declared; That every man, whether inhabitant or foreigner, free or not free, shall have liberty to come to any publick court, council or town meeting, and either by speech or writing to move any lawful, seasonable or material question, or to present any necessary motion, complaint, petition, bill or information whereof that meeting hath proper cognizance, so it be done in convenient time, due order and respective manner. (1641.)

2. *Every inhabitant who is a householder, shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town or the general court have otherwise appropriated them.*

Provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed.

The which clearly to determine;

It is declared, that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining, shall have propriety to the low water-mark, where the sea doth not ebbe above a hundred rods, and not more wheresover it ebbs further :

Provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands.

And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowle there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow. (1641, 47.)

3. Every man of, or within this jurisdiction, shall have free liberty (notwithstanding any civil power) to remove both himself and his family at their pleasure out of the same, provided there be no legal impediment to the contrary. (1641.)¹

In the year 1869 the State of Massachusetts relinquished all its rights to ponds of less than twenty acres' area, so that, since 1869

¹ Colonial Laws of Massachusetts, p. 90.

only ponds of at least twenty acres are to be deemed "great ponds."¹

The doctrine which has received the sanction of the majority of the Supreme Judicial Court of Massachusetts presents a new danger to the mill-owners of a great manufacturing community. In reliance upon the general opinion and the unbroken legislative practice of many years, that the right to the uninterrupted flow of water in a natural stream, whatever its source, is absolute property, entitled to all the protection afforded by the Constitution, riparian lands and flowage rights have been purchased, and factories, great in extent and number, have been erected upon nearly every stream in Maine and Massachusetts, which is favorably situated and capable of furnishing water-power. Now, the mill-owners, who have made their investments in reliance upon a continuous supply of water, learn, for the first time, that when the stream furnishing their power happens to come from or flow through a "great pond," the only hope of protecting their property lies in a watchful oversight of the Legislature, as it meets from year to year, to prevent legislation which may take away their property. Already the precedent set by the act of 1886 in favor of the city of Fall River has been followed by statutes granting similar rights to several cities and towns.² Still others are said to have been merely awaiting the decision in the Watuppa Pond cases before making application to the Legislature for like privileges. The importance of the decision is not confined to Massachusetts. The Colony Ordinance of 1641-47 is also a part of the law of Maine, and the reasoning of the majority of the court might well be applied to the navigable waters of other States. It is, we are told, proposed to have the decision reviewed upon writ of error to the Supreme Court of the United States. This fact, taken in connection with the importance of the subject, may justify an examination of the grounds of the decision.

Before entering upon such examination it may be well to recall the following rules of law governing the rights of riparian owners at common law :—

I. The right to the use of a stream of water is incident to the

¹St. of 1869, c. 384.

²Ayer, Stats. 1887, c. 152, § 4; Malden, *ib.*, c. 416, § 5; New Bedford, *ib.*, c. 114, § 1; Ashburnham, Stats. 1888, c. 398, § 4; Maynard, *ib.*, c. 407, § 4; Millbury, *ib.*, c. 404, § 4.

land through which it passes. In the absence of controlling rights acquired by grant or prescription the riparian owners on a stream are entitled to the natural flow of the water without any diminution or obstruction except such as is incident to its reasonable use by the proprietors above. The water of the stream cannot lawfully be diverted, except for such use, unless it is returned again to its accustomed channel before it reaches the land of the proprietor below.¹

II. The diversion of the waters of a spring which is the source of a stream is equally a wrongful diversion of the waters as against a riparian proprietor on the stream as if the water had been taken lower down. The rule is the same where the source of the stream is a lake or pond, instead of a spring; for a pond is part of a natural watercourse, collected from springs and the adjacent watershed, on its way to the sea. The inflow from the springs and sources must be at least as large as the outflow by the stream, so that, all the time, it is moving and running water, and no owner of the land over which the water passes, no matter what may be the rate of its flow, has the right to divert it or diminish it to the injury of a riparian proprietor below.²

III. The right of the riparian owner to the undiminished flow of the stream is property within the meaning of the Constitution,³ and the Legislature cannot, even for a public purpose, like supplying a city with water, authorize the taking of this property—that is, authorize the diversion or diminution of the water naturally flowing in the stream—without providing for compensation to the riparian proprietors whose rights are thereby injuriously affected.⁴

It is therefore clear, as appears to have been admitted by all the members of the court in the recent Watuppa Pond cases, that the Legislature would not have had the right to authorize the taking of the water from the pond to the injury of the riparian pro-

¹ *Elliot v. Fitchburg R. R. Co.*, 10 Cush. 191; *Thurber v. Martin*, 2 Gray, 394; *Chandler v. Howland*, 7 Gray, 348; *Ware v. Allen*, 140 Mass. 513.

² *Dudden v. Guardians of the Poor*, 1 H. & N. 627; *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192; *Bennett v. Murtaugh*, 20 Minn. 151.

³ *Cary v. Daniel*, 8 Met. 466; *Wadsworth v. Tillotson*, 15 Conn. 366; *Harding v. Stamford Water Co.*, 41 Conn. 87.

⁴ *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Ipswich Mills v. County Commissioners*, 108 Mass. 363; *Lee v. Pembroke Iron Co.*, 57 Me. 481.

prietors on the Quequechan, if the North Watuppa Pond had been a pond of less than twenty acres.

The reasoning upon which the majority of the court in the cases under consideration base the right of the State to authorize the diversion of the waters of a "great pond" without making compensation is, in substance, as follows:—

"The colonies and the provinces derived their rights from the king under their several charters. These charters vested in the grantees not only the right of soil, but also large powers of government and the prerogatives of the crown in the seashores, bays, inlets, rivers and other property which were held for the use and benefit of all the subjects." Upon the organization of the State government all these rights became vested in the Commonwealth. The State, therefore, "has not only the *jus privatum*, the ownership of the soil, but also the *jus publicum* and the right to control and regulate the public uses to which the ponds shall be applied." The Colony Ordinance of 1641-7 defines "great ponds." "Although fishing and fowling are the only rights named in the ordinance, it has always been considered that its object was to set apart and devote the great ponds to public use," and the devotion to public use is sufficiently broad to include every such use as it arises. The riparian owners upon the outlet stream hold their land subject to the rights in "great ponds" reserved by the State. The grant of the right to take the water for the use of a city without making compensation is a public use. Consequently riparian owners on the outlet stream have no redress for the taking of the water of the pond.

The minority of the court rest their dissent upon the following ground: "The ordinance secures to the Commonwealth, in great ponds, the same kind of ownership in the water that an individual purchaser of the entire area of a small pond could get by a perfect deed or by an original grant from the government without restrictions. If this pond had no outlet his title to the water in it would enable him to use it in any way he might choose. The water in such a pond would permanently appertain to the *locus*, and would belong as entirely to the owner of the place in which it accumulated as the land itself by which it was supported. If his pond happened to be a link in a chain through which water made its course from the mountains to the sea, his ownership of the water would give him only the reason-

able usufruct of it as it was passing by. He could not consume it, or put it out of visible existence as he might the solid land within his purchase, because such a use of it would be inconsistent with the right of his neighbors to enjoy their real property in its natural state. In this view, in order to describe the quality of his ownership, it is sometimes said that a riparian proprietor has no title to the water itself of a running stream, but only to the usufruct of it. In a sense that is true; in another sense he has a perfect title to the water, considered as water of a stream; for the property is real estate naturally moving in a defined course, and he has as good a title as it is possible to have, in view of the nature of the subject to which it relates. Merely as an owner, and apart from the exercise of sovereignty, which has no relation to these cases, the Commonwealth could have no better."

The issue between the majority and the minority of the court thus resolves itself into the single question whether the ownership by the State of the waters of "great ponds" is something different and more extensive than the ownership by a private individual of a small pond.

It will be noted that the majority of the court rest their declaration of these larger rights of the public in "great ponds" not upon any peculiar proprietary interest of the State in the soil under the pond, but upon the sovereign and governmental rights which the State holds as trustee for the public. Obviously the mere ownership by a private individual of the soil under a pond or stream gives no right to the appropriation of the waters themselves, and it would hardly be contended that the State would stand in a more favorable position than a private owner, so far as merely its proprietary interest in the soil is concerned. No authority could be found for the proposition that the proprietary interest of a State in a piece of land in which it owns the fee is not held subject to the same limitations as that of a private owner — sometimes expressed in the maxim, *sic utere tuo ut alienum non lœdas*. It would hardly be supposed that the State, any more than a private individual, could dig on its land to the injury of adjacent land, or maintain a nuisance thereon. The proprietary interest of the State in water flowing over its land must be limited, as in the case of a private individual,—to its reasonable use as it passes by; in other words, so far as the proprietary interest of the State is con-

cerned, no property in the water itself can be predicated. This seems to be admitted by all the members of the court.

If, then, the rights of the State in the waters of a "great pond" are held to be different or more extensive than the absolute grant of a small pond would confer upon a private person, the basis of such exceptional rights must be found in the sovereign powers of the State over its waters, and in Massachusetts we should expect to find such sovereign rights defined either (1) by the words of the Colony Ordinance itself, or (2) in the practical interpretation given to it by universal custom and legislative practice, or (3) in the legal interpretation of its provisions by the judiciary.

(1.) The ordinance does not, by its terms, purport to reserve to the State any exceptional rights. It merely secures to the public the right of "free fishing and fowling" in "great ponds," and authorizes them "to pass and repass on foot through any man's propriety for that end, so that they trespass not upon any man's corn or meadow," and provides that no town shall appropriate to any particular person or persons any "great pond." In other words, the ordinance declares that the towns, in parcelling out their real estate, shall retain their great ponds, and, instead of reserving the right to use this property to the privileged few, the ordinance dedicated the ponds to the use of the public generally for the purposes named. We fail, therefore, to find in the words of the ordinance itself any foundation for the assertion by the State of the right to drain a "great pond" without making compensation to the riparian proprietors on the outlet stream.

(2.) There is no general custom, long acquiesced in, upon which such a claim of right can be based; on the contrary, the universal custom and the unbroken legislative practice in Massachusetts had proceeded upon the theory that the Commonwealth did not possess this extraordinary right in great ponds. It is admitted, in the opinion of the majority of the court, that the act of 1886, c. 353, granting to the city of Fall River the power to take the water, introduced a new policy into the legislation of Massachusetts.

(3.) The decisions prior to the cases under examination do not establish any exceptional rights in the State. For two hundred and ten years after the enactment of the ordinance no case was decided which undertook to determine what the rights in "great ponds" were. In 1851 the object of the provisions in the ordi-

nance relating to "great ponds" was first announced by Chief Justice Shaw, and since then numerous cases involving the interpretation of these clauses of the ordinance have been decided.

In *Commonwealth v. Alger*, 7 Cush. 53, 68 (1851), Chief Justice Shaw says : "In analyzing this ordinance, which thus appears as one act, it appears that that part of it which relates to free fishing and fowling in all great ponds, and in creeks, coves and rivers where the sea ebbs and flows, was taken word for word from the 'Body of Liberties,' section 16." . . . "The great purpose of the 16th article of the 'Body of Liberties' was to declare a great principle of public right, to abolish the forest laws, the game laws, and the laws designed to secure several and exclusive fisheries, and to make them all free." .

In *Cummings v. Barrett*, 10 Cush. 186, 188 (1852), an action by a riparian owner on the outlet stream against a littoral owner on the pond for diminishing the supply of water by cutting ice, Chief Justice Shaw first indicated, *obiter*, what the rights of riparian owners on an outlet stream of a pond might be. "By the Colony Ordinance of 1641, Ancient Charters, 148, 149, all great ponds, which are defined to be ponds of over ten acres, are declared public; and, though lying within any town, shall not be appropriated to any particular person or persons. We are not aware that this ancient law has ever been altered. What the rights are of adjacent or riparian owners of land bordering on such ponds, has, we believe, never been the subject of adjudication or discussion. Some rights, we suppose, have always been exercised by such proprietors, such as a reasonable use of the water, for domestic purposes, and for watering cattle. But in the advanced state of agriculture, manufactures, and commerce, and with the increased value of land and all its incidents, there will probably be hereafter increased importance to the question, whether and to what extent such riparian proprietors have a right to the use of the waters, for irrigating land, for steam-engines, for manufactories which require a large consumption of water, and for the supply of their own ice-houses, for delivery to neighbors, and for more distant traffic.

"In a case between the owners of a mill with the privilege of a mill stream, and the riparian owner of land, on a large pond, supplying such mill stream, the nearest analogy perhaps, and that is apparently a strong one, is to that of riparian proprietors, on a running stream."

In *Tudor v. Cambridge Water Works*, 1 Allen, 164 (1861), the bill in equity set forth that complainant was the owner of about forty-eight acres of land under Fresh Pond, in Cambridge, containing about one hundred and eighty-three acres; and also of the shore adjoining and of the outlet of the pond and of the land under and on both sides of the same; that he and those under whom he claimed had for more than forty years taken ice from that portion of the surface of the pond now belonging to him, as an article of merchandise, and that the right to take ice is of great value; that the defendants' act of incorporation gave them no right to take water from the pond to the injury of the plaintiff; that a late statute authorized defendants to take water for the purpose of supplying the inhabitants of Cambridge, provided that they should not at any time draw below low-water mark, and further authorized defendants to take, hold and convey land, water or water rights, under limitations and for purposes therein expressed, provided that before entering upon land or water rights, or taking any water of any persons or corporation, they should file their petition to this court, praying for the appointment of commissioners to assess damages, if any; that such commissioners had not been appointed, nor had defendants filed such petition, but they had entered upon water rights of plaintiff and had taken and drawn off water from his land, and diverted the water from his outlet, by means whereof his right to take ice and his fish rights were injured. To this bill the defendants filed a general demurrer, and their counsel argued that, as there was no averment that water had ever been drawn below low-water mark, the right granted to defendants to take the water to that extent was independent of private rights, because "the Legislature had the right to provide that the defendants might take water from the pond for the purpose specified, without payment of damages. It is a great pond, and by the Colonial Ordinance of 1641 such ponds shall not be appropriated to any particular person. They remain, therefore, the property of the Commonwealth." The court overruled the demurrer on the ground that the bill stated a sufficient case for the interposition of equity to prevent a nuisance, and the demurrer admitting, as it did, the facts stated to be true, the court could not "assume that the defendants have not infringed on the private property and rights of the plaintiff, nor that he had no such title or right as averred in the bill." On the point taken by counsel the court say: "If he [the complainant]

is the owner of such rights as he avers, then the defendants have no authority to take them without suitable compensation ; nor can the Legislature give to the defendants any power to appropriate them without affording a remedy to the plaintiff, by which he can recover the value of his property, which has been thus taken for a public use." Thus the court met the earliest intimation that the State, through its so-called ownership of great ponds, could take their waters to the detriment of private rights, without compensation.

Inhabitants of West Roxbury *v.* Stoddard *et al.*, 7 Allen, 158 (1863), was an action by the town of West Roxbury against the defendants for entering upon Jamaica Pond and carrying away a large quantity of ice which the plaintiffs claimed was theirs by virtue of their ownership of the pond. The plaintiffs maintained that, by the act of May 3, 1636, the territory which includes Jamaica Pond was granted to the town of Roxbury; that, by this grant and the authority conferred on towns by the acts of 1635 and 1684, the fee of the land on which the pond lies, including the water of the pond, vested in that town ; that subsequently, in 1851, on a division of the town, the title passed to West Roxbury. The defendants owned land on the borders of the pond, and without permission, and in the face of express prohibition from the town, proceeded to cut and carry away ice as merchandise. The court gave judgment for the defendants, taking the ground that, assuming the fee in the land to be in the town of West Roxbury, as claimed, that fact did not prevent the Ordinance of 1641-1647 from applying to the pond, because " the towns were public bodies, organized for public purposes ; and any property granted to them, which had not been conveyed to private persons, they might rightfully, by the law and usage of the colony, be required to devote to such public uses as the legislative authority should, by general laws, designate and determine." Hence " great ponds, containing more than ten acres, which were not before the year 1647 appropriated to private persons, were by the colony ordinance made public, to lie in common for public use," . . . " whether at that time included in the territory of a town or not." In delivering this opinion, the court declare, for the first time, the purposes, other than those specifically enumerated in the ancient ordinance, for which the great ponds are to be deemed to be devoted to public use, in the following language: " The uses which may be made

of the water of ponds and lakes in Massachusetts, by littoral proprietors, have never been judicially determined; but by long and well-established usage they are undoubtedly numerous. *Cummings v. Barrett*, 10 Cush. 188. With the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, become capable of many others which are within the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all, as they arise. . . . Fishing, fowling, boating, bathing, skating or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds, to all persons who own lands adjoining them or can obtain access to them without trespass, so far as they do not interfere with the reasonable use of the pond by others, or with the public right, unless in cases where the Legislature have otherwise directed."

It will be noted that the so-called ownership by the public of the pond is, so far as the rights are thus set forth, practically an easement to use the pond in a reasonable manner for any of the purposes for which *as a pond* it is serviceable, and that it does not extend beyond the rights which a private individual would in Massachusetts possess in a pond of less than twenty acres owned by him.

In *Paine v. Woods*, 108 Mass. 160 (1871), a complaint under the mill acts for overflowing, by means of a dam, a tract of land bounded on a "great pond," the law of "great ponds" is likened to that of tide waters, and thereby the ownership of the State in lands underneath the pond is impliedly affirmed.

In *Fay v. Salem and Danvers Aqueduct Co.*, 111 Mass. 27 (1872), the plaintiff was a littoral proprietor on a "great pond," and sought damages from an aqueduct corporation to which the Legislature had granted the right to draw water from the pond. The act provided for the payment of damages suffered by any one by the taking of the water. The plaintiff complained that, by the withdrawal of the water from the pond, his house was rendered uncomfortable, and unfit for the purposes for which it was designed. The petition was dismissed. This case is cited by the majority of the court in the recent Watuppa Pond cases as similar to the one at bar. But the explanation of the decision given in *Fay v. Salem and Danvers Aqueduct Co.*, in the dissenting opinion, shows that the

case cannot be relied upon to support the conclusion reached by the majority of the court. Referring to that case, Mr. Justice Knowlton says: "His petition was dismissed on two grounds. One was that such an injury was too remote to be the subject of an assessment of damages under the statute, and the other that he had no private right of property in the pond. It has been held in several of the above-cited cases that the public, as well as the land-owners along a great pond, may make a reasonable use of it for obtaining water, and for fishing, fowling, bathing, boating and skating. In other words, every member of the community who can gain access to it has the same rights in it that riparian proprietors commonly have in similar ponds. It was therefore decided that a land-owner upon it, whose land comes only to the water's edge, has in it no separate right, but only a right as one of the public. That which would otherwise be his private right is held to be merged in his public rights. See *Lyon v. Fishmongers' Co.*, 10 Ch. App. 679. It follows, therefore, that when the Legislature grants those rights to an individual or corporation, it does not deprive him of property. He is presumed to have bought his land knowing that he could acquire no property in the pond, and trusting to the probable preservation of the public rights for his enjoyment of it.

"But these decisions do not touch the question whether the owner of land upon a watercourse below can be deprived of water by diversion at the fountain head. Mr. Justice Gray says, in the opinion in the case which we are considering, that the Legislature 'had full authority to grant the right to an aqueduct corporation to take and conduct the water of the pond for the use of the inhabitants of towns in the neighborhood; making due compensation for any private property taken for this public use.' But the cases I have cited show that depriving a riparian proprietor upon a running stream of the use of water, by diverting it at a pond above, is taking his property, within the meaning of those words in the constitution. This very case, therefore, recognizes the constitutional requirement of compensation to those whose water rights are taken in this way." . . .

"In *Fay v. Salem and Danvers Aqueduct*, *ubi supra*, it is said of the water that 'the Legislature, and the respondents acting under their authority, had the right to take and draw it off for the public use.' But this was merely a statement of their right in reference to the petitioners, who had no rights in it, and not of a general

right to take it without compensation as against riparian proprietors upon a stream below. For not only is the necessity to make compensation for property so taken recognized in a former part of this opinion, but the statute under which the suit was brought provided for it, and the court expressly held, in an opinion by Chief Justice Bigelow in a former suit between the same parties, that the taking of this very water was an exercise of the right of eminent domain. Statute 1850, chapter 273. *Fay v. Salem and Danvers Aqueduct*, 9 Allen, 577."

That the real ground upon which the decision in *Fay v. Salem and Danvers Aqueduct Co.*, 111 Mass. 27, rests, was the remoteness or the peculiar nature of the damage suffered by the petitioner, and not the right of the Commonwealth to drain the pond at its pleasure without making compensation, appears from *Bailey v. Inhabitants of Woburn*, 126 Mass. 416 (1879), and *Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267 (1883). Both were petitions by riparian owners on the outlet stream of "great ponds" for damages to their water rights, by the taking of the water from the ponds for supplying the town of Woburn and the city of Fall River respectively. In the former case the statute provided that the "town of Woburn shall be liable to pay all damages that shall be sustained by any persons in their property by the taking of any land, water or water rights." In the latter case the act provided that "the city of Fall River shall be liable to pay all damages that shall be sustained by any person or persons in their property by the taking" of water from the pond. In both cases it was held that the petitioner was entitled to recover. The cases of *Cowdrey v. Woburn*, 136 Mass. 409 (1884), and *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394 (1885), are to the same effect. The water subtracted from the ponds in these four cases belonged to the State in the same sense as the water subtracted in the case of *Fay v. Salem and Danvers Aqueduct Co.*, 111 Mass. 27. The public purpose for which the State authorized its taking was precisely the same in each of the five cases; yet the four later decisions show that while there may be no right of the riparian owners on a great pond to recover for an injury to their houses resulting from drawing down the pond, there is a right in the riparian owners on a stream fed by a great pond to the maintenance of its ordinary flow, the question in each case arising as against the public. These cases establish, therefore, that it was the nature of the damage to the

littoral proprietor, and not the nature of the Commonwealth's right in the pond, which prevented a recovery in *Fay v. Salem and Danvers Aqueduct Co.*, 111 Mass. 27. Hence that case does not support the position of the majority of the court in the present Watuppa Pond cases.

The cases which have been examined above are the only ones in Massachusetts prior to these Watuppa Pond cases relating to rights in "great ponds," except *Hittinger v. Eames*, 121 Mass. 539 (1877), and *Gage v. Steinkrauss*, 131 Mass. 222 (1881), which simply reaffirm the doctrine that littoral proprietors on "great ponds" have no other right to cut ice thereon than any other person who can legally obtain access to the ponds; *Commonwealth v. Tiffany*, 119 Mass. 300 (1876), which affirms the rights of the Legislature to resign (as it did by Stat. 1869, chap. 384) to the littoral proprietors on ponds between ten and twenty acres in extent all privileges previously enjoyed by the public therein; and *Commonwealth v. Vincent*, 108 Mass. 441, and *Cole v. Inhabitants of Eastham*, 133 Mass. 65, which declare that the Legislature may, with a view to encouraging the cultivation of useful fishes, lease to individuals the exclusive right of fishing in great ponds for a limited period.

The only cases in Maine relating to rights in "great ponds" are *Barrows v. McDermott*, 73 Me. 441 (1882), where the right of the public to fish, and *Brastow v. Rockport Ice Co.*, 77 Me. 100 (1885), where the right of the public to cut ice, were affirmed.

We submit, therefore, that at the time of the decision in the last Watuppa Pond suits, there was no case in the books establishing in the public any right in "great ponds," other than a private individual would possess in Massachusetts in a pond of less than twenty acres' area. There are, it is true, certain *dicta* in Massachusetts cases which might seem to favor the view of the majority; but, upon more careful examination, they will hardly be regarded as authorities in its favor.

In *The Inhabitants of West Roxbury v. Stoddard*, 7 Allen, 158, 168 (1863), Mr. Justice Hoar says: "There is no adjudged case in which any right in them [great ponds], adverse to the public, has ever been recognized; and in the cases in which the water has been taken for the supply of towns and cities under legislative authority, we are not aware that any private ownership or title to the water in any town or city has been asserted and maintained as

a ground of damage." That sentence can be naturally and grammatically confined in its application to any "private ownership or title" *in a town*; but, assuming that the court meant its remark to refer as well to "private ownership" in individuals, still the subject-matter of the decision and the whole context show that the "private ownership or title to the water" contemplated by the court was ownership in the water of the pond *quâ pond*, and not in the water itself. The only question at issue, and the undivided attention of the court was upon it, was the right of the public to fish, fowl, boat, bathe, skate, ride in or "upon these ponds" (p. 171), or to take water or ice *from these ponds*, as against any private ownership of any of these uses of the pond; the right of the public, or of any one else, to interfere with the natural flow by appropriating the water was not in question, and it may be added that such appropriation would be inconsistent with the uses named, because destructive of the pond.

Again, in *Fay v. Salem and Danvers Aqueduct Co.*, 111 Mass. 27 (1872), Mr. Justice Gray says: "By the law of Massachusetts, great ponds are public property, the use of which for taking water or ice, as well as for fishing, fowling, bathing, boating, or skating, may be regulated or granted by the Legislature at its discretion." We have shown above that the decision in this case contains nothing to support the contention of the existence of any right in the State to drain the pond without making compensation to the riparian owners on the outlet stream. And we may add that Mr. Justice Gray cites in support of his *dictum* only "*Anc. Chart.* 148, 149; *Cummings v. Barrett*, 10 Cush. 186; *West Roxbury v. Stoddard*, 7 Allen, 158; *Paine v. Woods*, 108 Mass. 160, 169; *Commonwealth v. Vincent*, *ib.* 441; *Tudor v. Cambridge Water-Works*, 1 Allen, 164." All of these authorities have been examined above, and in the last of them the suggestion that the Legislature might authorize the taking of the water of a "great pond" without the payment of compensation was expressly repudiated.

In *Trowbridge v. Brookline*, 144 Mass. 139, 143 (1887), where the petitioner recovered for damages to her well resulting from building a sewer, Mr. Justice W. Allen, delivering the unanimous opinion of the court, says: —

"The decisions in regard to damages occasioned by taking the waters of great ponds are also in point. When the Commonwealth grants a right to take the water, a provision that payment

shall be made for all damages sustained by any person in his property by the taking is held to include damages to mill owners by depriving them of the water, although they would have no right to it as against the Commonwealth or its grantee. *Watuppa Reservoir v. Fall River*, 134 Mass. 267." The force of that *dictum* is removed by the fact that in *Watuppa Reservoir v. Fall River*, 134 Mass. 267, the question under consideration is expressly left open, and by the further fact that Mr. Justice W. Allen was one of the three dissenting judges in the recent *Watuppa Pond* cases.

We submit, therefore, that prior to this decision the cases in Massachusetts and Maine had recognized in the public only such rights in "great ponds" as any private individual would have in a small pond of which he was the sole littoral proprietor; in other words, that the right of the public in "great ponds" was to their use *quâ* ponds; they established the full right of the public to use, and hence the right in the Legislature to regulate the use of, "great ponds," but not the right to destroy them. There was nothing, therefore, in the earlier cases which should have led the court to the conclusion that the Legislature could authorize a diversion of the water of "great ponds" without payment of compensation for the injuries done thereby to riparian owners on the outlet stream. On the other hand, the language of the ordinance itself does not countenance the position of the majority of the court; the unbroken course of legislative practice was opposed to it; and the earlier decisions, while not necessarily determining the precise point, had established principles which it is difficult to reconcile with the view now advanced. To lay down, under such circumstances, a doctrine which overturns what had previously been regarded as an established rule of property, thus affecting most seriously many valuable water privileges, seems like a near approach to judicial legislation, and that, too, of doubtful expediency. It is a wide departure from the spirit which has in the past led the Commonwealth of Massachusetts to foster its manufacturing industries by every means in its power, and the decision is to be regretted especially, because it comes at a time when all the restraints imposed by the Constitution and the courts are needed to protect private property from the encroachments of the Legislature.

Samuel D. Warren, Jr.
Louis D. Brandeis.

STATUTORY CHANGES IN EMPLOYERS' LIABILITY.

NO legal principle, with a growth of less than half a century, has become more firmly fixed in the common law of to-day, than the rule that an employer, if himself without fault, is not liable to an employee injured through the negligence of a fellow-employee engaged in the same general employment. This exception to the well-known doctrine of *respondeat superior*, although sometimes considered an old one,¹ was before the courts for the first time in 1837, in the celebrated case of *Priestly v. Fowler*, 3 M. & W. 1, which, it is said, has changed the current of decisions more radically than any other reported case. Thirteen years later the above rule was again laid down in the case of *Hutchinson v. The York, New Castle, and Berwick Railway Company*, 5 Ex. 343, which definitely settled the law of England. The Scotch judges at first repudiated the new doctrine,² but they were quickly overruled by the House of Lords on appeal in the two cases of the *Bartonshill Coal Company v. Reid*, and the *Bartonshill Coal Company v. McGuire*, reported in 3 McQueen, 266 and 300. The Irish courts have uniformly followed *Priestly v. Fowler*,³ and no recourse to the House of Lords has been found necessary to bring them into line.

The American law, though in harmony with the English, seems to have had an origin of its own. In 1841, *Murray v. The South Carolina Railroad Company*, 1 McM. 385, decided that a railroad company was not liable to one servant injured through the negligence of another servant in the same employ. Although this decision came a few years after *Priestly v. Fowler*, the latter case was cited by neither counsel nor court. It is probable, therefore, that the American court arrived at its conclusion entirely independent of the earlier English case, — a fact often lost sight of by

¹ Willes, J., in *Gallagher v. Piper*, 16 C. B. N. S. 677, and Pollock, C. B. in *Vose v. Lancashire and Yorkshire R. Co.*, 2 H. & N. 728.

² *Sword v. Cameron*, 1 Scotch Sess. Cas. 493 (1839); *Dixon v. Rankin*, 14 Scotch Sess. Cas. 420 (1852).

³ The first case was *McEnergy v. Waterford and Kilkenny R. Co.*, 8 Ir. C. L. R. 312 (1858).

those who, in criticising the rule, assert that it all sprang from an ill-considered opinion by Lord Abinger in *Priestly v. Fowler*. The leading American case, however, is *Farwell v. Boston and Worcester Railroad Company*, 4 Met. 49, which, following the South Carolina case, settled the rule in the United States. It has been followed in nearly every jurisdiction, both State and Federal.

To escape liability under the rule, however, the employer must be without negligence himself. He must select workmen and machinery reasonably suitable for the work in hand, and in case of injury he must show that he was unaware of the incompetence of the men or the defect in the machinery, and that he exercised reasonable care in making his selections. It should be noticed, too, that the employer is not exempt from liability unless the person causing and the person suffering the injury are "fellow-servants" engaged in the "same common employment." Without attempting to go into a discussion of the much-mooted meaning of these two phrases,¹ it will be sufficient for the purposes of this paper to say that the tendency of the American courts, especially since the case of *Chicago, Milwaukee, and St. Paul Railway Company v. Ross*, 112 U. S. 377, has been to interpret them favorably to the employees; while the English courts, together with those of Maine, Massachusetts, New York, Pennsylvania, and a few other States, have extended the terms to include a great variety of cases, thereby increasing largely the immunity of the employers.

This doctrine of common employment, as the above rule is generally called, has been bitterly opposed. It rests, at best, upon grounds of public policy of thirty or forty years ago,—grounds which to-day have perhaps ceased to exist. Be that as it may, the fact remains that frequent attempts have been made to alter the law by legislation. It should be noticed, however, that general statutes afford no relief. Unless provision for remedy in cases of negligence of fellow-servants is expressly made, the courts apply rigorously the common-law rule excusing the master from liability. For instance, in Missouri it is held that a statute giving a right of action against a railroad company "whenever any person shall die from any injury resulting from, or occasioned by, the negligence, unskilfulness, or criminal intent

¹ See *Shearman and Redfield on Negligence*, vol. I, chap. x. (1888).

of any officer, agent, servant, or employee," does not alter the common-law rule in this respect.¹ In Maine, the common law in its application to railroad corporations was not changed by R. S., chap. 81, § 21, providing that "every railroad corporation shall be liable for all damages sustained by any person in consequence of any neglect of the provisions of the foregoing section, or of any other neglect of any of their servants, or by any mismanagement of their engineer, in an action on the case by the person sustaining such damages." The court held that "statutes, unless plainly to be otherwise construed, should receive a construction not in derogation of the common law." Consequently the words "any person" are limited to such persons as are not servants of the corporation.² In *Randall v. Baltimore and Ohio Railroad Company*, 109 U. S. 478, the Supreme Court held that a statute providing that "the corporation owning the railroad shall be liable to any person injured for all damages sustained" by neglect to ring the locomotive bell, did not make the corporation liable for an injury to a brakeman caused by the negligence of a fellow-servant, a fireman.

Statutes have been passed, however, with the special purpose of modifying or abolishing the doctrine of common employment. In Georgia, Iowa, Kansas, Wisconsin, Montana, and Wyoming the legislatures have guarded the employees of railroad corporations from the common-law rule of non-liability. In England, Alabama, and Massachusetts the statutory changes have been more extensive, and are confined to no special class of workmen.³

The first legislature in this country to attack the growing power of the doctrine of common employment was that of Georgia. Prior to 1856 there was no right of action in the State by an employee when the injury was caused by the negligence of a co-employee. In that year a statute⁴ was passed providing that

¹ *Proctor v. Hannibal and St. J. R. Co.*, 64 Mo. 112. Cf. 9 Heisk. 276.

² *Carle v. Bangor and Piscataquis C. & R. Co.*, 43 Me. 269.

³ Employers' liability is slightly increased by the Illinois Miners Acts of 1872 and 1877, and the Kentucky Statute (2 Stanton's Rev. Stat. Ky. 510, § 3) as to killing through wilful neglect; but more than a passing notice of them is unnecessary. The same is true of the English Factory Acts of 7 Vict., c. 15, § 21, and the English Coal-Mines Regulation Act of 35 and 36 Vict., c. 76, § 26. The California Statute (Codes and Stats. Cal. 6971, § 1971, and 6970, § 1970), copied by Dakota (Revised Code, 1877, p. 396), makes no material change in the common law.

⁴ Acts of 1855-56, p. 155.

employees of railroads could recover, if without negligence themselves, when the injury was caused by the act of a co-employee. This statute was incorporated into the successive codes. The provisions of the present code relating to employers' liability are the following :¹ —

§ 2083. "Railroad companies are common carriers and liable as such. As such companies necessarily have many employees who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employees as to passengers for injuries arising from the want of such care and diligence."

§ 3036. "If the person injured is himself an employee of the [railroad] company, and the damage was caused by another employee and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

This exception to the common-law doctrine, however, is confined strictly to railroads, as § 2202 enacts that "the principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business. The exception in the case of railroads has been previously stated."

How far these different sections modified one another, it became necessary for the courts to decide. In *Thompson v. Central Railroad and Banking Company*, 54 Ga. 509, the plaintiff, a switchman, was injured by the dropping of a bar of iron on his shoulder by the carelessness of some laborers engaged in carrying the iron across the defendant's yard. The court below granted a nonsuit, on the ground that the road was not liable to an employee for injuries received from co-employees, unless connected with the running of trains. To this ruling the plaintiff excepted, and the question before the court was, whether in a case not connected with the running of trains the road was liable. In a previous case,² the court thought there might be doubt "whether the section embraces any injuries but such as are sustained from the running of the cars or engine." The court here, however, held the company liable, reversing the judgment. This construction has been repeatedly followed and recognized. In *Georgia Railroad and Banking Company v. Goldwire*, 56 Ga. 196, the court said that these provisions "declare in unmistakable

¹ Code Ga., 1873.

² *Henderson v. Walker*, 55 Ga. 481. This case was decided before, though reported after, *Thompson's case*. *Vide Georgia Railroad v. Ivey*, 73 Ga., 499, 503.

terms that any employee who is free from fault can recover for the negligence of any other employee without respect to whether the two were engaged about the same business or not. This is the invariable rule that holds between railroad companies and their employees, under our code." In the latest case, *Georgia Railroad v. Ivey*, 73 Ga. 499, the statute was held to apply to an employee of the company killed by the carelessness of other employees, all engaged in the erection of a bridge.

In no case, however, can the employee recover unless without fault in himself. In *Campbell v. Atlanta and Richmond Air Line Railroad Company*, 53 Ga. 488, it was held that the burden was on the plaintiff to show that the injury was caused without fault or negligence on his part. A year later, in *Thompson's case*, to which reference has already been made, it was held that it was for the company to show the injured employee either at fault or negligent. The court adds, in a note¹ to its opinion, that, in deciding the case before it, consideration of the case in 53 Ga. 488, was inadvertently omitted. It was shown, however, in *Central Railroad and Banking Company v. Kelly*, 58 Ga. 107, 113, that these two cases might be reconciled by applying this test, — that if the plaintiff is wholly disconnected with duties about the particular business in which he was hurt, the presumption of law that he is without fault arises; but if he was engaged in the duty in the discharge of which he was hurt, the burden is on him to show that he was without fault. In *Savannah, Florida, and Western Railway v. Barber*, 71 Ga. 644, it is pointed out that a charge to the effect that the burden is on the plaintiff to show not only himself blameless, but the defendant negligent, is erroneous. "The moment the plaintiff proves to the jury either, the legal presumption proves the other until rebutted, and the defendant must rebut that presumption."

The next State to alter the law was Iowa. Down to 1862 the common-law rule prevailed.² In that year the Legislature passed an act, chap. 169, of which the seventh section provided that "every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents or by any mismanagement of the engineer or other employees of the corporation, to any person sus-

¹ P. 513.

² *Sullivan v. The M. & M. R. R. Co.*, 11 Ia. 421.

taining such damage." Objection was at once made to the act as unconstitutional; but the objection was overruled by the court in *McAunich v. Mississippi and Missouri Railroad Company*, 20 Ia. 338.¹

Under this statute the court has held, in *Hunt v. Chicago and North Western Railroad Company*, 26 Ia. 363, that the liability of the company was measured by a different standard of negligence from that applied in cases of injury to passengers. While extraordinary care and caution are required with respect to passengers, only ordinary care is due to the employee. Wright, J., dissented on the ground that the same rule should be applied to both passenger and employee.

The original law of 1862, twice amended (by ch. 121, 13 G. A., and ch. 65, 14 G. A.), was incorporated into the Code of 1880, vol. i, § 1307, where it now stands in the following form:—

"Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

This statute has given rise to much litigation. The clause limiting the liability of the company to employees engaged in operating a railway has been strictly construed. It has been held, for instance, that an employee whose duties consisted in operating the turn-tables, opening the doors of the engine-house, and shovelling off the snow, was not within the statute as operating a railway. Hence to him the common-law rule applied, preventing a recovery for an injury suffered through the negligence of a fellow-servant.²

The same is true of a mechanic in a machine-shop of the company;³ of one whose duty it was to repair cars standing on a side-track, and occasionally to ride on the road to make such repairs;⁴

¹ See also *Deppe v. The Chicago, R. I., & P. R.R. Co.*, 36 Ia. 52, and *Bucklew v. The Central Iowa Ry. Co.*, 64 Ia. 603.

² *Malone v. B., C. R., & N. R. Co.*, 65 Ia. 417.

³ *Potter v. C., R. I., & P. R. Co.*, 46 Ia. 399.

⁴ *Foley v. C., R. I. & P. R. Co.*, 64 Ia. 644.

of track repairers;¹ of employees engaged in hoisting coal into a coal-house,² or loading a car;³ of one who kept the appliances in a round-house in proper condition.⁴ The statute does apply, however, and give relief to one engaged in working on a bridge and occasionally required to ride on the train in the course of his employment;⁵ to a section hand;⁶ to one engaged in shovelling gravel from a gravel train;⁷ to one operating a dirt train;⁸ to a detective walking on the track looking for obstructions;⁹ and to foreman of gang of workmen employed in the construction and repair of bridges on the road.¹⁰

Whether or not the character of the plaintiff's employment brings him within the provision of the code is a question of fact for the jury.¹¹

A receiver comes within the meaning of the statute as a person managing a railway. Although he is not liable personally, a judgment against him could be satisfied out of the funds in his hands.¹²

It should be borne in mind that in all these cases coming up under the statute, if the employee is guilty of contributory negligence he has no remedy. The burden is on the plaintiff to show that he was in the exercise of due care.¹³ It may be inferred, however, from the circumstances of the case, without direct proof.¹⁴

In Kansas the first attempt to modify the law was made in 1874, by the passage of chap. 93, § 1, of the acts of that year. This act was subsequently incorporated into the Civil Code, now reading as follows:—

“Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence

¹ *Matson v. C., R. I., & P. R. Co.*, 68 Ia. 22.

² *Luce v. C., St. P., M. & O. R. Co.*, 67 Ia. 75.

³ *Smith v. B., C. R., & N. R. Co.*, 59 Ia. 73.

⁴ *Manning v. B., C. R., & N. R. Co.*, 64 Ia. 240.

⁵ *Schroeder v. C., R. I., & P. R. Co.*, 47 Ia. 375.

⁶ *Fraudsén v. C., R. I., & P. R. Co.*, 36 Ia. 372.

⁷ *McKnight v. I. & M. R. C. Co.*, 43 Ia. 406.

⁸ *Deppe v. C., R. I., & P. R. Co.*, 36 Ia. 52.

⁹ *Pyne v. C., B., & Q. R. Co.*, 54 Ia. 223.

¹⁰ *Houser v. C., R. I., & P. R. Co.*, 60 Ia. 230.

¹¹ *Schroeder v. C., R. I., & P. R. Co.*, 41 Ia. 344.

¹² *Sloan v. C. I. R. Co.*, 62 Ia. 728.

¹³ *Rusch v. City of Davenport*, 6 Ia. 443, 452; *Baird v. Morford*, 29 Ia. 531.

¹⁴ *Nelson v. C., R. I. & P. R. Co.*, 38 Ia. 564.

of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage."¹

This provision, it will be seen, was copied almost verbatim from the Iowa Act of 1862; like its predecessor, it was at once assailed as unconstitutional, but with the same ill success.² Not only is the act constitutional, but a contract in contravention of it has been held void.³

The statute gives to employees the same rights as those enjoyed by strangers. It gives the former, however, no greater rights. It does not "make the corporation responsible to them for the acts and conduct of agents and employees outside the scope of their duties, or chargeable with the knowledge of a notice to employees in such matters."⁴

In *Atchison, Topeka, & Santa Fé Railway Company v. Koehler*, 37 Kas. 463, it was held that a man employed to work about the track and in the yard of the railroad company, injured by the negligence of a fellow-servant, came within the provisions of the act. The case of *Union Pacific Railway Company v. Harris*, 33 Kas. 416, is cited as authority for the decision. In that case a section-man who, with others, was engaged in unloading from a car rails to be used in the repair of the track, was injured by the carelessness of his co-employees, whereby a rail was thrown on his foot. He was held to be within the protection of the statute.

Wisconsin presents the curious example of a State which has attempted to change the doctrine of common employment by statutory provisions, and then abandoned the attempt and gone back to the old doctrine. Up to 1875 the common-law rule of employers' liability held sway.⁵ In that year a statute⁶ was passed making railroad companies liable for injuries to servants. The law, § 1816 R. S., 1878, is as follows:—

"Every railroad corporation shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or ser-

¹ Compiled Laws of Kansas, 1885, § 5204.

² *Missouri Pacific R. Co. v. Haley*, 25 Kas. 35.

³ *Kansas Pacific R. Co. v. Peavey*, 29 Kas. 169.

⁴ *Solomon R. Co. v. Jones*, 30 Kas. 601, 609.

⁵ *Chamberlain v. M. & M. R. Co.*, 7 Wis. 425; *Anderson v. M. & St. P. Ry. Co.*, 37 Wis. 321.

⁶ Laws of 1875, chap. 173.

vant thereof without contributory negligence on his part, when sustained within this State, or when such agent or servant is a resident of, and his contract of employment was made in, this State, and no contract, rule, or regulation between any such corporation, or any agent or servant, shall impair or diminish such liability."

This section of the Revised Statutes was repealed in 1880,¹ and to-day the common-law rule has no restrictions placed on it by legislation.² The only case which ever reached the Supreme Court was *Gumz, admx., v. Chicago, St. Paul, and Minneapolis Railway Company*, 52 Wis. 672, decided in 1881, in which a nonsuit ordered by the court below was sustained on the ground that there was no negligence on the part of the agent or servant of the company causing the injury.

The statutes in the two Territories, Wyoming and Montana, have never been before the courts. They read as follows:—

Compiled Laws of Wyoming (1876), 512, chap. 97 (approved 1869): "Any person in the employment of any railroad company in this territory who may be killed by any locomotive, car, or other rolling stock, whether in the performance of his duty or otherwise, his widow or heirs may have the same right of action for damages against such company as if said person so killed were not in the employ of said company; any agreement he may have made, whether verbal or written, to hold such company harmless or free from an action for damages in the event of such killing shall be null and void, and shall not be admitted as testimony in behalf of said company in any action for damages which may be brought against them; and any person in the employ of said company who may be injured by any locomotive, car, or other rolling stock of said company, or by other property of said company, shall have his action for damages against said company the same as if he were not in the employ of said company, and no agreement to the contrary shall be admitted as testimony in behalf of said company."

Laws of Revised Statutes of Montana (1879), 471, § 318:—

"That in every case the liability of the [railroad] corporation to a servant or employee acting under the orders of his superior shall be the same, in case of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger."

Such is the history of employers' liability legislation down to 1880. Four States and two Territories have passed statutes practically abolishing the doctrine of common employment, but only in the single case of railroad employees. In Iowa the exemption is restricted closely to those employees actually engaged in the hazardous business of railroading. In Georgia and Kansas a

¹ Laws of 1880, chap. 232.

² *Heine v. C. & N. W. Ry. Co.*, 58 Wis. 525; *Peace v. C. & N. W. Ry. Co.*, 61 Wis. 163.

broader rule prevails. In Wyoming the exceptions are limited to injuries occasioned by the rolling-stock, — a phrase which in time will be frequently before the courts for definition. In Montana the employee and the passenger are treated, in many respects, with the same consideration. In three of these jurisdictions — Iowa, Wisconsin, and Wyoming — any attempt to contravene the statute by contract or otherwise is expressly prohibited. In one — Kansas — such an attempt, although not expressly prohibited, is not sustained by the courts. Of these six jurisdictions, one only has repealed the statutory provisions. In the other five they remain in full force and operation. Whenever contracts in contravention of the statute, however, are allowed, the will of the Legislature is easily thwarted.

The next step in the history of legislation on this subject is an important one. The harshness of the rule of non-liability of employers, increased rather than diminished by the constant flow of decisions, led to an extensive agitation of the question in England, in which the workmen's associations took a prominent part. In 1877 the attention of Parliament was called to the subject, but it was not till 1880 that "The Employers' Liability Act"¹ was finally passed. The provisions of this act are as follows : —

"Where, after the commencement of this act, personal injury is caused to a workman —

(1.) By reason of any defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer; or

(2.) By reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence; or

(3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed; or

(4.) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

(5.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, —

the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the

¹ 43 and 44 Vict., c. 42.

same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."

To recover, however, it must appear that the defect in (1) arose from the negligence of the employer, or of some one intrusted by him with the duty of keeping the works in proper condition. If the workman knew of the defect, and failed to give notice within a reasonable time, his remedy is barred. The sum receivable as compensation is limited to the amount of estimated earnings, during three years preceding the injury, of a person in the same grade as the injured employee. Notice of injury must be given within one week, and action begun within six months, of the occurrence of the accident, or, in case of death, within twelve months.

Any penalty paid under act of Parliament to a workman shall be deducted from the compensation which that workman may receive for the same cause of action under the provisions of this act. "A person who has superintendence intrusted to him" is defined as "a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor." The expression "workman" means a railway servant, and any person to whom the Employers and Workmen Act of 1875 applies, *i.e.*, laborers, servants in husbandry, journeymen, artificers, handicraftsmen, mechanics, miners, and in general any one engaged in manual labor.¹

In theory the act was far-reaching in its purport. In practice it has fallen far short of accomplishing the results expected of it. This is largely due to the omission of any provision prohibiting contracts in contravention of the act. Taking advantage of this fact, many railway and mining companies, private corporations, and individuals, with more or less persuasion compelled their employees to sign contracts of hire releasing them from liability for damage under the act. The question of the validity of such contracts came up in the case of *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357, which held, not only that an employee may contract himself out of the protection of the act, but that such a contract will bar the right of his widow to sue in case the injury results in

¹ This does not include an omnibus conductor (*Morgan v. London General Omnibus Company*, 13 Q. B. D. 832), nor the driver of a tram-car (*Cook v. North Metropolitan Tramways Company*, 18 Q. B. D. 683).

his death. The effect of the decision is, that the employee can bargain away the rights of his family, secured by Lord Campbell's Act, as well as his own right to recover damages. Under the influence of this case, it is now, it is authoritatively stated, a very common practice for employees to sign such contracts. So, at the outset, a large class of operatives and laborers have to be omitted in considering the practical results of the act. Add to this the fact, shown by carefully compiled statistics, that in eighty-nine per cent. of all the cases decided under the act, the plaintiff has failed to maintain his action because of contributory negligence, and it will be seen that the number of employees actually benefited by the act is small. Moreover, the act does not abolish the defence of common employment. It is still a good defence in certain cases. If the person causing, and the person suffering, the injury are fellow-servants of the same grade, the liability of the master remains unchanged. The act does do away, however, with much of the law that has grown up since *Priestly v. Fowler*, the very law which has been most complained of by workmen.

As would be expected, actions on the Employer's Liability Act have been frequent, and the number of cases which have reached the higher courts is numerous.

Under sub-section one, relating to "defect in the condition of the ways, works, machinery, or plant," it has been held that a vicious horse is a defective "plant;"¹ that "works" must be taken to mean works already completed, and not works in course of construction, which are on completion to be connected with the business of the employer;² that "defect in the condition of machinery" includes unsuitable machinery, and is not confined to cases where the machinery has become defective;³ that the same clause covers a case where the machine, though not defective in its construction, was, under the circumstances in which it was used, calculated to cause injury to those using it;⁴ that obstacles lying in the way which do not in any degree alter the fitness for the purpose for which it is generally used, and cannot be said to be incorporated with it, do not make it defective within the meaning of the section.⁵ A "defect in the condition of the way" was not shown by the following facts: There were two wells

¹ *Yarmouth v. France*, 19 Q. B. D. 647.

² *Howe v. Finch*, 17 Q. B. D. 187.

³ *Cripps v. Judge*, 13 Q. B. D. 583.

⁴ *Heske v. Samuelson*, 12 Q. B. D. 30.

⁵ *McGiffin v. Palmer's Shipbuilding and Iron Company*, 10 Q. B. D. 1.

in a house, one intended for an elevator and the other for a stairway; rubbish was frequently thrown down the first; in the second the men placed their ladders to reach the upper stories; in time this well was filled in with the stairs, and the ladders were transferred to the other well; while ascending, a workman was injured by the throwing of rubbish down upon him.¹

Under sub-section two it has been held that the employer is liable, though the superintendent, when negligent, is voluntarily assisting in manual labor.² The superintendent need not, of necessity, have actual superintendence over the workman injured.³ In another case, the plaintiff and one X.⁴ were engaged with others in loading sacks of corn into the hold of a vessel. X.'s duty was to guide with a guy-rope the beam of the crane used in lowering the sacks, and to give direction when to lower and hoist the chain. By his negligence in not using the guy-rope, the sacks fell down the hatchway and injured the plaintiff; but it was held that X. was "engaged in manual labor" and was not "a person having superintendence intrusted to him."⁴ A somewhat similar case was *Kellard v. Rooke*, 19 Q. B. D. 585. The plaintiff, with other workmen, was stowing bales of wool in the hold of a ship. The men were divided into gangs, with a foreman for each gang. The bales were drawn to the hatchway, and then dropped down to the workmen below. The foreman of the plaintiff's gang worked on deck and signalled the men below before a bale was dropped. By his failure to give the customary signal the plaintiff was injured by the falling of a bale. It was held that the injury was not caused by the negligence of a person who had "any superintendence intrusted to him, whilst in the exercise of such superintendence," or by reason of the "negligence of any person in the service of the defendant, to whose orders or direction the plaintiff was bound to conform," *i.e.*, the foreman did not come within the provisions of either sub-section two or three.

Under sub-section five there have been numerous cases before the courts. "Railway" is not confined to railways operated by railway companies, but includes a temporary railway laid down by a contractor for the purposes of the construction of works.⁵ A

¹ *Pegram v. Dixon*, 55 L. J. Q. B. 447.

² *Osborne v. Jackson*, 11 Q. B. D. 619. ³ *Ray v. Willis*, 51 J. P. 519.

⁴ *Shaffers v. General Steam Navigation Company*, 10 Q. B. D. 356.

⁵ *Doughty v. Firbank*, 10 Q. B. D. 358.

steam crane fixed on a trolley and propelled by steam along a set of rails, when it is desired to move it, is not a locomotive engine.¹ H., employed as a "capstan-man" by a railway company, propelled a series of trucks along a line of rails without giving the usual warning. Consequently, the plaintiff, employed in similar work a hundred yards off, was injured. The capstan was set in motion by hydraulic power communicated to it by H. from a stationary engine. It was held, under these facts, that H. was a person who had the control of "a train upon a railway."² A person employed in the signal department of a railway, whose duty is to clean, oil, and adjust the points and wires of the locking apparatus along the line, under the orders of the inspector of that department who is responsible for the same, is not a person having "charge or control" of the points.³

Alabama was the first of the American States to follow the example of Great Britain in passing an Employers' Liability Act. On February 12, 1885, the Legislature passed an act entitled "An Act to define the liabilities of employers of workmen for injuries received by the workman while in the service of the employer." This act was elaborated somewhat for the new Code of 1887, where it now stands, as follows :⁴ —

"When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employee, as if he were a stranger, and not engaged in such service or employment, in the cases following : —

1. When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer.

2. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

3. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employee, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed.

4. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or

¹ *Murphy v. Wilson*, 48 L. T. 788.

² *Cox v. Great Western Railway Company*, 9 Q. B. D. 106.

³ *Gibbs v. Great Western Railway Company*, 12 Q. B. D. 208.

⁴ Civil Code, 1887, 1, § 2590.

made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf.

5. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway.

"But the master or employer is not liable under this section, if the servant or employee knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer or such superior already knew of such defect or negligence; nor is the master or employer liable under subdivision one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

Then follow two brief sections (§§ 2591, 2592) allowing the personal representative to sue if injury results in death, and exempting damages recovered by the servant from payment of debts or other legal liabilities.

This statute, as was pointed out by the court in the first case coming up under it, "is a substantial copy of the English act." It gives the employee a right of action in certain cases as if he was one of the public, taking away from the employer the defence of common employment; but "when the employee who is injured and the employee whose negligence caused the injury are of the same grade, and as to all employees who do not come within either of the specified classes, the common-law rule still applies."¹

Although there has been a number of cases on the statute in the lower courts, up to the present time only two cases, besides the one just referred to, have reached the Supreme Court. In *Georgia Pacific Railway Company v. Brooks*, 4 So. Rep. 289, the court held that a hammer used for driving spikes into cross-ties on a railroad was not "machinery" within the meaning of the act. In *Georgia Pacific Railway Company v. Propst*, 4 So. Rep. 711, the question as to who could claim the benefit of the statute came up. The court said: "Under the statute, the party claiming damages must be an employee at the time of the injury by

¹ *Mobile & Birmingham R'y. Co. v. Holbron*, 4 So. Rep. 146 (May, 1888).

contract, express or implied, binding on the defendant; and the injury must be received while rendering the service required by the particular employment or in obeying the order of a superior to which the employee is bound to conform. Injury received while doing other more hazardous service not pertaining to the employment, by way of accommodation, or self-assumed, is not sufficient. . . . The burden is on the plaintiff to prove a case within the provisions of the statute defining the liability of employers." Consequently, where a night watchman at a station, accustomed to ride upon defendant's trains to a neighboring station for his meals, was injured, while so riding, by complying with the conductor's request to assist in making a coupling, it was held that there was no such employment as brakeman as rendered the company liable for the injury.

In Massachusetts, after an agitation of the subject for several years, an Employers' Liability Act was passed in 1887, entitled "An Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employees in their service." The provisions of the act are as follows :¹—

"Where, after the passage of this act, personal injury is caused to an employee who is himself in the exercise of due care and diligence at the time —

(1.) By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; or

(2.) By reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence.

(3.) By reason of the negligence of any person in the service of the employer who has the charge, or control of any signal, switch, locomotive engine, or train upon a railroad, the employee, or in case the injury results in death the legal representatives of such employee, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee, nor in the service of the employer, nor engaged in its work."

This act, it will be noticed, resembles closely the provisions made in Alabama, and consequently in Great Britain. The Massachusetts law, however, goes farther than that of the other State

¹ Acts of 1887, chap. 270.

in enacting certain restrictions after the nature of the English act. For instance, compensation for personal injury shall not exceed four thousand dollars. For death, compensation shall not be less than five hundred dollars nor more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer or the person for whose negligence he is made liable. To maintain any action under the statute, notice of the time, place, and cause of the injury must be given to the employer within thirty days, and action begun within one year, from the date of the accident. An employer who has contributed to an insurance fund for the benefit of employees may prove in mitigation of damages the proportional benefit which the employee seeking to recover compensation has received from such contribution. If the employee knew of the defect or negligence, and failed to give notice thereof, he cannot recover. An employer is made liable to employees of a contractor or sub-contractor injured by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer or of some person intrusted by him with the duty of seeing that they were in proper condition. If an employee is instantly killed, the widow, or next of kin, if dependent upon the wages of deceased for support, may recover as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered. Domestic servants and farm laborers do not come within the scope of the act.

In the Acts of 1888, chap. 155, it was provided that, if the incapacity of the person injured prevented the giving of the notice within the specified time, the said notice could be given within ten days after the incapacity was removed, or, in case of death, within thirty days after the appointment of the executor or administrator.

Numerous cases on this statute have been before the Superior Court; but as yet only one has been decided in the Supreme Court of the State.¹

The facts were as follows: The defendant furnished a movable stage for the use of the plaintiff and a fellow-servant, each end

¹ *Ashley v. Hart*, October, 1888 (not yet reported).

being fastened to the house in which they were at work. The fellow-servant had charge of lowering one end and the plaintiff the other. The former neglected to fasten his end securely, whereby the plaintiff was injured. The declaration did not allege any defect in the condition of the stage itself. In sustaining a demurrer to this declaration, the court says, referring to the statute :—

“ This so far changes the common law as to give a right of action to a servant who is injured by a defect in the machine, tool, or appliance itself, which is furnished for his use, although such a defect arose from the negligence of a fellow-servant whose duty it was to see that the machine, tool, or appliance was in proper condition. But it does not give a right of action against the employer for the negligence of a fellow-servant in handling or using a machine, tool, or appliance which is itself in a proper condition.”

This case, curiously enough, the first on the subject, points out that the doctrine of common employment still exists in Massachusetts, as it does in Great Britain and in Alabama. The statute, as has been noted in the case of the English and Alabama acts, simply restricts and limits the application of that doctrine by exempting certain cases from its operation.

Both in Alabama and in Massachusetts the courts will undoubtedly be influenced by the decisions of the English courts. Unlike Alabama and Great Britain, however, Massachusetts has a law which will prevent private contracts from virtually repealing the statutory provisions. By P. S., chap. 74, §3, it is provided that —

“ No person or corporation shall by a special contract with persons in his or its employ, exempt himself or itself from any liability which he or it might otherwise be under to such persons for injuries suffered by them in their employment and which result from the employer's own negligence or from the negligence of other persons in his or its employ.”

As Massachusetts has long been regarded as the stronghold of the rule of non-liability of employers, holding that servants in command and even vice-principals are fellow-servants within the scope of the doctrine of common employment, the passage of an Employers' Liability Act, even if somewhat limited, will have considerable weight in other jurisdictions.¹ Indeed, it seems but a

¹ For a criticism of the Massachusetts doctrine, see Shearman and Redfield on Negligence, cited *supra*. A very recent case, *Benson v. Goodwin*, 17 N. E. Rep. 517, holding

question of time when the old harshness of the law in regard to employees will be done away with. The tendency of the American law is to interpret the doctrine of common employment more liberally in their favor. Great Britain and Massachusetts, jurisdictions in which their rights were much restricted, have modified the law to their advantage. In several of the Southern and Western States the doctrine has been abolished as to railroad employees,—a class in which injuries are of frequent occurrence. Below these surface indications is the trend of public opinion, not supporting capital at the expense of labor, nor labor at the expense of capital, but favoring a more equitable distribution of the responsibility which must fall upon the one or the other whenever labor is injured in the employ of capital.

In conclusion, it is interesting to note that the continental law already holds that position towards which our law is slowly drifting. In France, under the Civil Code,¹ an employer is held liable to one employee injured by the negligence of a co-employee. The law of Italy is the same.² In Germany, owners of railroads, mines, quarries, pits, or factories are made liable in certain cases for the negligence of employees.

Marland C. Hobbs.

BOSTON, MASS.

that the mate of a merchantman, and a common sailor under him, were fellow-servants within the rule, shows to what an extent the doctrine is still carried. See also *Rogers v. Ludlow Manufacturing Co.*, 144 Mass. 198, 203.

¹ Article 1384.

² Italian Code, art. 1152.

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WE have received the following interesting communication upon the subject of conditional pardons, which has been kindly sent us by ex-Governor Hoadly, of Ohio:—

"In the number of the HARVARD LAW REVIEW for November, 1888, just received, I notice, upon page 181, a note with regard to the grant of conditional pardons, which induces me to write you to say that, for many years, at least since 1869, it has been provided by law in Ohio that pardons or commutations may be granted 'on such terms as the Governor deems proper to impose.' (66 Ohio Laws, 287, section 214.)

"By an amendment to this act, passed in 1882 (79 Ohio Laws, 122, 3 Williams Revised Statutes, 11), now numbered as section 89A of the Revised Statutes of Ohio, it was provided that 'a violation of the conditions of the pardon shall be held to be a forfeiture of the pardon, and shall render the person pardoned liable to be recommitted to the penitentiary, there to serve the remainder of his sentence as though he had not been pardoned.'

"The residue of the section provides for the method of procedure in such cases, which is, in substance, this: That the governor requests, in writing, the prosecuting attorney of the county, in any such case of violation, to file an information thereof in the office of the probate judge of said county, whereupon the judge issues a warrant to the sheriff, the sheriff arrests the prisoner, the question of violation is tried before the probate judge, and if the charge be sustained, the prisoner is returned to the warden of the penitentiary under a warrant from the probate judge to the sheriff.

"During my term of office as Governor of Ohio I was compelled twice to recapture persons whom I had pardoned, and they are now, or, at least, one of them is now in the Ohio penitentiary, serving the residue of his original sentence.

"These were both flagrant violations of the condition, accepted by the prisoner at the time of pardon, to abstain from the use of intoxicating liquors. This experience was very painful to me, and rendered me extremely doubtful whether this particular condition was wisely imposed. These doubts never left me, but I yielded during my whole term to the

argument of my friend and predecessor, Governor Foster, who claimed that this pledge would greatly assist a man to reform, would make it on his lips a valid excuse to avoid drinking if tempted. I am anything but sure about this, and have been greatly disturbed in mind by the failure of these two cases out of, say, twenty cases in which I tried the experiment.

"The importance of conditional pardons has been very much lessened in Ohio, however, by the adoption, in 1885, partly (I am happy to say) at my instance, of the English ticket-of-leave, or parole system. Any of your readers curious to follow the subject will find the Ohio law establishing the power of parole, and defining the method of its exercise, in 3 Williams Revised Statutes, p. 773, *et seq.* The parole system is in substance this: The directors of the penitentiary are authorized in the case of any convict who has served the *minimum* term, to which he might have been sentenced, it being his first term, to parole the prisoner for the unexpired residue of the term, that is to say, to let him go physically free. Theoretically, he is still in custody. If, at any time, it seems necessary or important, he may be recaptured and brought back at the instance of the directors upon a warrant issued by them to the warden.

"Practically, these paroles are freely granted to well-behaved prisoners whose friends provide employment for them, and in whose cases there seems to be assurance of a better life if they are allowed to mix once more with the community. They are required by the rules of the prison to report their whereabouts and prospects, monthly. They are not permitted to use intoxicating liquors in any way. The system has only been in force three years, but I believe that in the judgment of all who have been connected with penal administration in Ohio (and I know in my own), it is a very great success.

"It has diminished the labors of the governor and his associates (there is now an advisory pardon board in Ohio) very greatly, for the reason that in nine cases out of ten where pardon is solicited it is much more prudent to grant parole and test the ability of the prisoner to resist temptation, before delivering him entirely, or conditionally even, by the pardon or commutation from the effect of the sentence and its imputed guilt.

"This system of parole, being applicable only to first-term prisoners who have already served the *minimum* provided by law for the punishment of such crimes, leaves open to the governor and his board the use of the conditional sentence as a method of assisting the prisoner or the State, as the case may be, in all cases of life sentences, second and more term prisoners, and other prisoners who have not yet served the minimum.

"Practically, though not legally, the pardoning power in Ohio is now exercised only in one of these three classes of cases.

"While I am on this subject I may as well add that there is a curious case in the annals of Ohio jurisprudence upon the exercise of the power of commutation. Mrs. Sarah M. Victor, who was finally pardoned last year by the present governor of Ohio, Governor Foraker, was, in 1868, convicted of murder in the first degree, at Cleveland, Ohio. While under sentence of death, Governor Hayes commuted her punishment to imprisonment in the penitentiary for life. She was either really or professedly insane at this time, and not in condition to give

her consent to the commutation. In 1876, under the advice of counsel, who thought themselves astute, she refused to consent to the commutation, and sued out a writ of *habeas corpus*, but with a very different result from that which she or her counsel anticipated. Judge Bingham, of the Franklin Common Pleas (now Chief Justice of the Supreme Court of the District of Columbia), held that her consent was necessary to commutation, and that the imprisonment in the penitentiary was illegal, but that the result of these conclusions was, not that she should be discharged, but that she should be remanded to the sheriff for execution. From this she and her counsel took a writ of error to the Supreme Court, who held (31 Ohio St. 206) that her acceptance was not necessary to commutation. She was remanded to the penitentiary, and there remained until pardoned last year.

"Another curious question has arisen and been decided in Ohio upon the law of pardons, to wit, that an unconditional pardon is irrevocable although procured by fraud. (*Knappp v. Thomas*, 39 Ohio St. 377.)

"Oddly enough, although in this case Governor Foster attempted to revoke the pardon of the prisoner, who was recaptured and again imprisoned until discharged by *habeas corpus* issued in the case cited, the prisoner finally died from the consequences of the fraud itself, which consisted in eating soap to create emaciation, and give the idea that he was a dying man, upon which theory the pardon was granted.

"If you care to follow the subject of Ohio paroles further you will find, perhaps, some additional information in a pamphlet,¹ which I enclose herewith, being a copy of an address on the subject of pardons and commutations delivered by myself at the National Conference of Charities and Corrections, St. Paul, Minnesota, in July, 1886.

"Yours truly,

"GEO. HOADLY."

THE LAW SCHOOL.

LECTURE NOTE.

SLANDER. — CONDITIONAL PRIVILEGE. — (*From Mr. Schofield's Lectures.*) — A person making a false statement in good faith is protected when the communication has been made in the discharge of a duty, public or private, legal or moral, or in the conduct of his own business, in matters where his interest is concerned. To accuse a servant of misconduct, though in the presence of third parties,² to warn one's servants to avoid a person lately discharged from service,³ are excusable acts, because done in the conduct of one's affairs; while to give information when requested, or to volunteer it to protect a friend, is only to discharge a social duty.

Where the communication, being made solely in the interest of the person receiving it, has been volunteered, and no confidential relation existed at the time, the courts are inclined to say that, if made in good faith, in the absence of officiousness, the occasion was privileged. (*Adcock v. Marsh*, 8 Iredell, 369; *Odgers, S. & L.*, 2d ed., 213.)

¹ The Pardoning Power. By George Hoadly. Reprinted from Proceedings of Thirteenth National Conference of Charities and Corrections, held at St. Paul, Minn., July, 1886.

² *Toogood v. Spyring*, 1 C., M. & R. 181.

³ *Somerville v. Hawkins*, 10 C. B. 583.

But in *Joannes v. Bennett*, 5 All. 169, and several other cases, such communications, unless previously solicited, are held not privileged. See *Byam v. Collins*, 39 Hun, 204.

It has been decided by a recent case in the Court of Queen's Bench (*Thompson v. Dashwood*, 11 Q. B. D. 43) that mailing a letter, *prima facie* privileged, to the wrong person does not take away the privilege. The court put the case on the ground that the animus with which the plaintiff acted determined the question of privilege, and that, if his intention was otherwise justifiable, the privilege could not be taken away by a mere mistake.

The case has, as yet, been but little cited or discussed. It would seem, however, since the privilege exists only between certain persons, that any publication to other persons, by conduct involving negligence, should be held to be a violation of the privilege.

In *King v. Patterson*, 49 N. J. Law, 417, it was held that a mercantile agency was justified in making *bona fide* statements, which were false, in regard to the standing of a business firm, only when the publication was sent to those having actual business relations with the person libelled, the case belonging to that class of privileged communications where the communication is made in the interest of the person receiving it. This application of the rule is almost equivalent to saying that every statement in such a publication, which cannot be justified under the plea of the truth, is at the risk of the agency; for but few, if any, of the customers of a commercial agency can have such a direct personal interest in the standing of all persons rated in its publications as this case requires. The contract usually made by the agency with its customers, not to divulge the information given, strictly speaking, affords no protection, for it is a libel to publish such statements, even to a customer who has no interest in them. There was a dissenting opinion in *King v. Patterson*, but the case is supported by decisions in other States. See *Sunderlin v. Bradstreet*, 46 N. Y. 188.

The question whether a communication is conditionally privileged is a question of law for the court. *Gassett v. Gilbert*, 6 Gray, 94, 97. To destroy the privilege the plaintiff must prove "actual malice," which can be done, and is often done, by showing that the defendant exceeded the conditions on which the privilege rests, without other evidence of a malicious purpose. See per *Ld. Blackburn*, in *Capital and Counties Bank v. Henty*, 7 App. Cas. 741, at 787. But if the statements are in all other respects within the conditions of the privilege, a malicious or improper motive in making the publication will render the defendant liable. See *Stevens v. Sampson*, 5 Ex. D. 53.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ATTORNEY AND CLIENT — AUTHORITY OF ATTORNEY — COMPROMISE. — An attorney, by virtue of his employment, cannot bind his client by a compromise of the demand sued on. *Brockley v. Brockley*, 15 Atl. Rep. 646 (Pa.).

That an attorney may, without special authority from his client, dismiss a suit, extend time of payment, and, when he is employed in several suits, stipulate that the decision of one shall determine the others, see note at end of this case.

CARRIERS — INTOXICATED PASSENGER. — Partial intoxication does not excuse want of ordinary care and prudence on the part of a passenger, and a railroad company need exercise no higher degree of care towards a person partially intoxicated than is required in case of persons not intoxicated. *Missouri Pac. Ry. Co. v. Evans*, 9 S. W. Rep. 325 (Tex.).

CONFLICT OF LAWS — CAPACITY TO CONTRACT — LEX LOCI. — Where a female infant executed in Ireland, where she was domiciled, an antenuptial contract, relinquishing all her rights of dower, it being contemplated at the time that she would live after the marriage in Scotland, it was *held*, on the death of the husband, that since her capacity to bind herself by the marriage contract must be determined by the law of the place where she was domiciled and where the contract was made, and since, under the Irish law, an infant cannot incur any except a beneficial obligation, she was at liberty to avoid the contract, and claim her rights as a widow under the Scotch law. "The principle of international private law, which makes, in certain cases, the law of the place where it is to be performed the legal test of the validity of a contract, rests, in the first place, upon the assumption that the parties were, at the time when they contracted, both capable of giving an effectual consent; and, in the second place, upon an inference derived from the terms of the document, or from the circumstances of the case, that they mutually agreed to be bound by the *lex loci solutionis* in all questions touching its validity," and can have "no application to a case in which, at the time when they professed to contract, one of the parties was, according to the law of that party's domicile, and also of the place of contracting, incapable of giving consent." *Cooper v. Cooper*, 13 App. Cas. 88 (Eng.).

It is to be regretted that in this case, since the contract was made in the country where the woman was domiciled before marriage, the Lords were not called upon to decide the interesting question whether the capacity to contract depends on the law of the contractor's domicile, or on the law of the country where the contract is made. Lord Halsbury, L. C., expresses a decided opinion that the laws of the domicile should govern in such a case, and not the *lex loci contractus*, relying chiefly on the authority of Story's Conflict of Laws, § 64. The other Lords seem to be in doubt.

CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWER — SPECIAL LEGISLATION — LOCAL OPTION. — A local-option law, providing that, if the majority of the voters of any country shall vote against the sale of intoxicating liquors, no liquor license shall be granted in that county, is a lawful delegation of power by the Legislature, and is not in conflict with a constitutional provision that "the Legislature shall not pass private, local, or special laws regulating the internal affairs of towns and counties." *State v. Circ. Ct. of Gloucester Co.*, 38 Alb. L. J. 348 and 370 (N. J. Ct. of Errors & Appeals).¹

This case also decides that a license law which establishes a different minimum license fee for the different towns and cities of the State, according to population, is not a violation of the constitutional provision against "local or special" laws, *supra*, but is a valid general classification.

The court was divided on each of the two propositions of the case, eight judges being for the majority opinion, and seven dissenting. A long opinion, with full discussion, supports each view.

See *State v. Pond*, 6 S. W. Rep. 469 (Mo.), digested 2 HARV. L. REV. 49, for the view that a local-option law is not a delegation of legislative power, but is a law to take effect upon the happening of a future contingency, namely, the vote of the people of the respective localities.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — "DRUMMER TAX." — A Texan statute, imposing a license tax on all drummers selling goods by sample, or otherwise, although a valid tax upon drummers who are inhabitants of the State, is an invalid tax upon drummers who are citizens of other States, being, to this extent, an unconstitutional regulation of interstate commerce. *Asher v. State of Texas*, 9 Sup. Ct. Rep. 1.

Robbins v. Taxing Dist., 120 U. S. 489, digested 1 HARV. L. REV. 108, is followed as an authority without further discussion, and *Asher v. State of Texas*, 5 S. W. Rep. 91 (Tex.), is reversed.

In *Robbins v. Taxing Dist.*, *supra*, it will be remembered Waite, C. J., delivered

¹ [S. C. Paul v. Gloucester Co., 50 N. J. Law 585.]

a vigorous dissenting opinion, in which Field and Gray, JJ., concurred. The two last-named justices do not express any dissent from this present decision.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — DUE PROCESS OF LAW — PROHIBITORY LIQUOR LAW. — An Iowa statute prohibiting the manufacture or sale within that State of intoxicating liquors, either for domestic use or exportation, except for mechanical, medicinal, culinary, or sacramental purposes, making the sale or manufacture for other purposes a penal offence, providing for the abatement of such other sales or manufactures as a nuisance, and forfeiting the liquor unlawfully kept on hand, is not an unconstitutional attempt to regulate interstate commerce. The regulation of interstate commerce deals with questions of transportation, not of manufacture; the fact that the products of domestic manufacture are intended to become the subjects of interstate commerce does not bring the regulation of such manufacture within the control of Congress. *Kidd v. Pearson*, 9 Sup. Ct. Rep. 6, affirming 34 N. W. Rep. 1. See Cooley's Principles of Const. Law, pp. 66, 67, and *State v. Fitzpatrick*, 37 Alb. L. J. 290 (R. I.), digested 2 HARV. L. REV. 97, *accord*.

Kidd v. Pearson also holds that the abatement as a nuisance, under the statute, *supra*, of a distillery erected for the manufacture and sale of intoxicating liquors for other purposes than those specified, does not deprive the citizen of his property without "due process of law." *Mugler v. Kansas*, 123 U. S. 623, digested 1 HARV. L. REV. 304, is followed and cited as deciding "that a State has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits; to prohibit all sale and traffic in them in said State; to inflict penalties for such manufacture and sale, and to provide regulations for the abatement as a common nuisance of the property used for such forbidden purposes."

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — POLICE POWER — LICENSING ENGINEERS. — An Alabama act, providing that engineers and other railroad employees shall be examined by a medical board to determine whether or not they are "color-blind," is a constitutional exercise of State legislation which may be validly applied to a railway company having its lines, on which an engineer runs, reaching into another State. A law passed by a State for the protection of the public safety, which is not directed against interstate commerce, and only affects it incidentally, is a valid exercise of the police power of the State, and remains in force until superseded by congressional legislation upon the subject. *Nashville, C. & St. L. Railway Co. v. Alabama*, 9 Sup. Ct. Rep. 28.

Smith v. Alabama, 124 U. S. 465, digested 1 HARV. L. REV. 405, is followed as authority. See Cooley's Principles of Const. Law, pp. 69-74, *accord*.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TAX ON TELEGRAPH COMPANIES. — Where a tax levied by a State upon a telegraph company consists of taxes on messages wholly within the State, and on messages partly within and partly without the State, and the record discloses the amount assessed on each class, the State can only recover the tax on those messages transmitted wholly within the State, the further tax being an unconstitutional regulation of interstate commerce. *West. Union Tel. Co. v. Com. Penn.*, 9 Sup. Ct. Rep. 6.

This case has an especial interest in being the first reported opinion of Chief Justice Fuller; the judgment is a model of brevity. *Ruttermann v. Tel. Co.*, 127 U. S. 411, digested 2 HARV. L. REV. 143, is followed as authority without discussion.

CONSTITUTIONAL LAW — POLICE POWER — CIVIL RIGHTS. — The defendant excluded certain colored persons from his skating-rink. He was indicted under a clause in the Penal Code of New York, which declares that no citizen of the State can, by reason of race, color, or previous condition of servitude, be excluded from places of amusement. It was contended that this clause violates the provision of the United States Constitution that no one shall "be deprived of life, liberty, or property, without due process of law." *Held*, however, that the clause is within the police power of the State. The argument is that the 13th, 14th, and 15th Amendments to the United States Constitution show that discriminations against colored people are against policy if made by a State. They are as much against policy if made by a private individual in his business, provided his business, like that of the defendant, is of a public nature. The case, therefore, comes within the principle of *Munn v. Illinois*, 94 U. S. 113, "that where one devotes his property to a use in which the public have an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by

the public for the common good, to the extent of the interest he has thus created." *People v. King*, 18 N. E. Rep. 245 (N. Y.).

CONSTITUTIONAL LAW — POLICE POWER — REGULATING COLOR OF IMITATION BUTTER. — A State statute prohibiting the sale of imitation butter, unless colored pink, having for its object the prevention of fraud on the public in the sale of provisions, is a valid and constitutional exercise of the police power of the State. *State v. Marshall* abstracted in 38 Alb. L. J. 362 (N. H.).

Compare *Powell v. Penn.*, 127 U. S. 678, digested 2 HARV. L. REV. 143, and *People v. Marx*, 99 N. Y. 377.

CONSTITUTIONAL LAW — PRIVILEGES OF CITIZENS. — The Maryland Act of 1884, c. 518, prohibits the use of vessels to buy oysters on the Chesapeake bay unless a license is obtained from the State therefor, conditioned upon a twelve, months' residence in the State, and the payment of a tonnage fee. *Held*, unconstitutional, as denying citizens of other States privileges enjoyed by those of Maryland. *Booth v. Lloyd*, 33 Fed. Rep. 593 (Md.).

CONTEMPT OF COURT — ADVERTISEMENTS FOR EVIDENCE. — A respondent in a divorce suit who *mala fide* placards about the village where his wife is living advertisements for evidence which are calculated to discredit her in the eyes of the public may be committed for contempt of court. But *semble a bona fide* attempt to procure evidence in a suit, even by an advertisement offering a reward, is not a contempt. *Butler v. Butler*, 13 P. D. 73 (Eng.).

CORPORATIONS — CONTRACTS IN RESTRAINT OF TRADE. — A steamship company, running vessels between New York and certain ports in Virginia, entered into an agreement with the defendant that, in consideration of a gross sum and certain monthly payments to be continued through five years, he would not run a competing line. A stockholder filed a bill in equity to restrain the company from going on with the contract, and to recover all that had been paid under it, upon the ground that it was *ultra vires*, and against public policy, because a restraint on trade. *Held*, that the contract was neither *ultra vires* nor against policy. With regard to the latter point it was said that the modern tendency is no longer to uphold in its strictness the doctrine which formerly prevailed about agreements in restraint of trade. This change is due to the enlargement of industrial and commercial facilities, so that little is to be feared from such agreements between individuals; and even corporations should be permitted to protect themselves from dangerous rivalry. But when they go farther than self-protection requires, and threaten the public good, then they should not be aided by the courts. *Leslie v. Lorillard*, 18 N. E. Rep. 363 (N. Y.).

CORPORATIONS — VOTING POWER OF PLEDGEE OF STOCK. — The voting power incident to ownership of shares of stock in a corporation is not lost when they become the property of the corporation, but is in effect equally distributed among the individual shareholders. When, therefore, the directors of a corporation pledge its own stock to secure a loan, they may expressly confer on the pledgee the right to vote on the stock, if by so doing an additional consideration is secured enuring to the benefit of all the shareholders. *Allen v. De Lagerberger*, 20 Wkly Law Bulletin, 368 (Superior Court of Cincinnati).

DEED — SHIFTING USE — AFTER-BORN CHILDREN. — Land was conveyed by deed to "Marion R. Mobley and the children she already has, and may hereafter bear, by her husband." *Held*, the estate vested in the living grantees, subject to open and let in the after-born grantees. The living grantees "may be regarded as trustees of a shifting use." *Mellichamp v. Mellichamp*, 5 S. E. R. 333 (S. C.).

DURESS. — The refusal of a bank to honor a depositor's checks, until the latter should release a claim against the banker, constitutes duress. *Adams v. Schiffer* 17 Pac. R. 21 (Col.).

DURESS — FINANCIAL EMBARRASSMENT. — A purchaser who has not caused the financial embarrassment of the seller, but takes it as an occasion to drive a hard bargain with the seller, does not exert duress. *Id.*

EVIDENCE — "COMPARISON OF HANDS." — SUBMISSION OF WRITINGS TO JURY. — Where certain signatures of a testator have been proved genuine, and witnesses have testified as to whether these signatures are in the same handwriting as the signatures in question, it is not proper to submit the signatures to the jury for their inspection and comparison. *Fuller v. Fox*, 7 S. E. Rep. 589 (N. C.).

In those jurisdictions where "comparison of hands" is allowed it is generally permissible to submit the writings to the jury. *Moody v. Rowell*, 17 Pick. 490; *State v. Ward*, 39 Vt. 225.

EVIDENCE — CROSS-EXAMINATION OF WITNESSES — INTERVENORS. — Third parties filed an intervention in a suit. On some of the issues presented, the interests of the plaintiff and defendant were identical in being opposed to those of the intervenors. The intervenors objected to the plaintiff's propounding, on cross-examination, leading questions to the defendant's witnesses on these issues. *Held*, that the intervention of third parties could not modify the general rule authorizing one of the parties to propound on cross-examination leading questions to the witnesses introduced by his adversary, and the objections were overruled. *Succession of Townsend*, 3 So. Rep. 488 (La.).

EVIDENCE — HEARSAY. — Defendant, having sold a pump to the plaintiff, sent an agent to put it in the plaintiff's well. While the agent was engaged in setting the pump, it fell in and destroyed the well. *Held*, in an action for damages against the defendant for the negligent conduct of his agent, that a declaration of the agent, made two hours after the accident, that the accident was caused by his own carelessness, was hearsay evidence and inadmissible. *Dodge et al. v. Childs et al.*, 16 Pac. Rep. 815 (Kans.).

HOMICIDE — LIABILITY FOR KILLING BY THIRD PERSON. — Several persons behaved in a riotous manner at a horse show, and when the town marshal attempted to arrest one of them knocked him down and beat him. The marshal, becoming alarmed, fired his revolver, and accidentally killed an innocent bystander. The court below charged the jury that if the defendants made the disturbance with the expectation that the marshal would attempt to arrest them, and if he defended himself in a reasonable manner, then all those who assisted in knocking down and beating him were responsible for the killing. *Held*, that the charge was erroneous. It is true that if the defendants, in prosecuting an unlawful purpose, should accidentally kill a man, they would be liable; but that the killing by another person was the reasonable outcome of their unlawful conduct is not enough to make them responsible. *Buller v. People*, 18 N. E. Rep. 338 (Ill.).

IMMIGRATION — CONTRACT LABOR — CLERGYMEN. — The statute entitled "An Act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States," imposes a penalty on any person or corporation encouraging migration of an alien under a contract or agreement previously made "to perform labor or service of any kind." Defendant, a religious corporation, engaged an alien residing in England to come to this country and take charge of its church as pastor. *Held*, that the corporation was liable to the penalty prescribed. *United States v. Rector, etc., of the Church of the Holy Trinity*, 36 Fed. Rep. 303 (N. Y.).

The statute contains a clause exempting from its provisions "professional actors, artists, lecturers, or singers," and in view of this proviso the court said that the words "labor or service of any kind" could not be given a restricted meaning so as to exclude the vocation of a minister of the gospel, but that they were intended to apply to all who labor in any professional calling not specially exempted.

INJUNCTION, PRELIMINARY — UNSETTLED RULE OF LAW. — On a bill for preliminary injunction by one rival water company against another, the legal right of the latter to do the acts complained of being in dispute *held*, that complainant is not entitled to a preliminary injunction when the right on which he founds his claim is, as a matter of law, unsettled: *Atlantic City Co. v. Consumers' Water Co.*, 15 Atl. Rep. 581 (N. J.).

LANDLORD AND TENANT — TENANCY FROM WEEK TO WEEK. — Where premises are let at a weekly rent, this constitutes a tenancy from week to week, and is a reletting of the premises at the beginning of each successive week; if, therefore, at the beginning of any week the premises are in a defective condition, the landlord is liable in damages to a tenant who, during the week, is thereby injured. *Sandford v. Clarke*, 59 L. T. Rep. (N. S.) 226 (Eng.); s. c. 38 Alb. L. J. 347.

This case is interesting as deciding the hitherto doubtful point that a weekly rental constitutes a tenancy from week to week. No authorities are cited.

LICENSE, BY PAROL — EQUITABLE ESTOPPEL. — A parol license to lay an aqueduct to a spring on the licensor's land is irrevocable after the aqueduct is constructed and during its continuance; and a court of equity will protect such license by injunction. *Clark v. Glidden*, 15 Atl. Rep. 358 (Vt.).

That a license to do an act on licensor's land, though acted upon, is revocable, see *Foot v. N. H. Ed. N. Co. et al.*, 23 Conn. 214; *Morse v. Copeland*, 2 Gray, 302.

LIFE INSURANCE — RIGHTS OF BENEFICIARIES. — A man describing himself as trustee for his children, insured his life for their benefit. He failed to pay the 16th annual premium, but shortly after it became due surrendered the policy to the company, which thereupon issued a new policy for the same amount and for the same annual premium, but payable to his second wife. The consideration of the new policy was the surrender value of the old. *Held*, that the old policy never lapsed, but was continued by the new, so that the children were entitled to the insurance. *Garner v. Germania Life Ins. Co.*, 18 N. E. Rep. 130 (N. Y.).

The court seemed influenced by the fact that the father declared himself a trustee, although it is not unlikely that the same conclusion would have been reached if the contrary had been true. Whether or not there could be a trust, depends upon the view which one takes as to the nature of the contract. If the beneficiaries have the sole legal right under the promise,—and such seems to be law,—then the father has absolutely nothing as the *res* to which a trust can attach. On the other hand, if the father has the sole legal right, there seems no technical difficulty in the way of his declaring himself a trustee, although the *cestuis* are already the legal beneficiaries. On either view there seem difficulties in the way of reaching the conclusion of the court.

(1.) Suppose the beneficiaries have the sole legal right. Then there is no trust. It follows that the father cannot make a valid release or surrender. Therefore the only defence left for the company is a breach of condition, unless the breach has been waived. Now, an ordinary life policy is a unilateral promise in consideration of a certain sum paid down to pay a certain sum to designated persons on the death of the insured, subject to the condition precedent that the insured pay annual premiums on fixed dates. *New York Life Ins. Co. v. Statham*, 93 U. S. 24. But see *contra*, *Worthington v. Ins. Co.*, 41 Conn. 372; *Phoenix Ins. Co. v. Sheridan*, 8 H. L. C. 745; and *STRONG, J.*, in *New York Life Ins. Co. v. Statham*. It is clear that either payment on the day named, or payment altogether, may be waived by the company. Here there was a breach by the non-payment on the 16th annual premium on the day named. The company could, therefore, on the next day treat the policy as utterly null and valueless; but instead of so doing they issued, a few days thereafter, a new policy in consideration of the surrender of the old. Their attitude, therefore, precluded them from insisting that the old policy became void by breach of condition. Thus there was a waiver; yet it is hardly fair to say that there was more than a waiver of payment on a fixed day, not of payment altogether. Now it appears to be law—and it was so stated in this case—that the beneficiaries, as well as the insured, may perform the condition by paying the premiums. Accordingly the children, when they learned of the breach, must pay all premiums in arrear, and all future premiums when due, in order that there shall be no further breach of condition than that which the company has waived. The result, then, of the first view mentioned above is that the old policy continues unaffected by the surrender, and that the children may recover the full amount of insurance, if they have made the payments just indicated. The existence of a second policy, which may or may not be good, strictly has nothing to do with the case, although it is not, from a practical point of view, altogether a satisfactory conclusion that there should be two policies; yet perhaps it is no more unsatisfactory than the conclusion reached by the court, which certainly violates the intention of the parties.

(2.) Suppose the father has the legal right, on which he has declared a trust. Then he commits a breach of trust in converting the old policy into a new one. He ought, therefore, to hold his interest in the latter, subject to a constructive trust for the defrauded *cestuis*; and the new beneficiary, being a donee, ought to hold any proceeds of the policy also under a constructive trust. The extent of that trust will be measured by the surrender value of the old policy. Even if the father has declared no trust, he is under a duty to exercise the right vested in him in behalf of the beneficiaries so far as may be necessary to protect them; and clearly he commits a breach of that duty in the nature of a tort when he

destroys the right by surrender. Neither he, nor one in the position of a donee, will be permitted to profit by this transaction at the expense of the beneficiaries; and the proceeds may be followed as before by means of a constructive trust.

The court held that the old policy was merged in the new, so that the payments on the new were made as if on the old. The latter idea seems erroneous, because the payments were never intended to be made on the old policy, but for a very different purpose. Even if that purpose failed, there would seem no excuse for applying them directly contrary to the intention of the parties. It should be said, however, that there is considerable authority for the general result reached by the court.

See 17 Abbott's New Cases, 21, for a collection of cases.

MASTER AND SERVANT—LIABILITY OF RAILROAD COMPANIES.—A person who goes with cattle on a railroad, to feed, load, and unload them, does not become an employee of the company by signing on agreement that he should be deemed an employee, the contract of shipment showing that he is, in fact, the agent of the owner, and the company is still liable to his heirs, although his death was the result of negligence on the part of its servants. *Missouri Pac. Ry. Co. v. Ivy*, 9 S. W. Rep. 346 (Tex.).

MORTGAGE—BOND FOR TITLES—LIABILITY FOR TAXES.—In taxing real estate which is subject to a bond for titles, the public authorities may treat it as the property either of the maker or of the holder of the bond, when the holder is in possession; but, as between the parties to the bond, the one receiving the rents and profits, or enjoying the use of the property, is liable for the taxes. *Nat. Bank of Athens v. Danforth*, 7 S. E. Rep. 546 (Ga.).

RAILROAD COMPANIES—STOCK-KILLING—PRESUMPTION OF NEGLIGENCE.—In an action to recover damages for the negligent killing of live-stock by the defendant's train, proof of the fact of the killing, and that it was inflicted by a moving train belonging to the defendant, makes out a *prima facie* case for the plaintiff; the *onus* is then cast on the defendant to overcome the presumption of negligence by proof of the circumstances of the killing. *Mobile & G. R. Co. v. Caldwell*, 3 So. Rep. 445 (Ala.).

WILLS—EXECUTORY DEVISE—CIVIL DEATH.—The testator's son was given a remainder in fee subject to an executory devise if the son died without children. After the death of the testator the son was convicted of murder in the second degree, and was sentenced to the State prison for life. The particular estate upon which his remainder was limited subsequently terminated. It was claimed, under 2 Rev. St. N. Y. 701, § 20, providing that a person sentenced to imprisonment for life, "shall thereafter be deemed civilly dead," that the son, being dead in the eye of the law, and having no children, was divested of his estate, so as to let in the executory devisee; but the claim was not allowed, because civil death does not divest a man of his estate. *Avery v. Everett*, 18 N. E. Rep. 148 (N. Y.).

This case is valuable for a discussion of what constitutes and what is the effect of civil death.

WILLS—LOSS OF TESTATOR'S DUPLICATE.—Where a will is executed in duplicate, and the testator retains one copy in his possession and deposits the other in the custody of another person, if, at the testator's death, his duplicate is not to be found, a presumption arises that it has been destroyed by him *animo revocandi*, and, in the absence of evidence to the contrary, the will is presumed to have been revoked. *Jones v. Harding*, 58 L. T. R. 60 (Eng.).

This decision was based on the authority of *Luxmoore v. Chambers*, an unreported case decided by Sir James Hannen, Mr. Justice Butt saying that without the authority of that case he should be disinclined to reach the result he did.

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A BRIEF SURVEY OF EQUITY JURISDICTION.¹

IV.

IT may have occurred to the reader to ask why the jurisdiction exercised by equity over contracts and other obligations is designated as specific performance, since equity always exercises its jurisdiction by compelling performance, and always makes such performance as specific as it is practicable to make it, and

¹ Continued from Vol. I., p. 387.

In discussing, in the preceding article (p. 377, n. 2), the effect of an agreement to convey property, in changing the equitable ownership of the property agreed to be conveyed, the writer had his mind entirely upon bilateral agreements for the purchase and sale of property, and it did not occur to him to call attention to the difference, in respect to the question under discussion, between such agreements and a unilateral agreement to convey property. It seems that an agreement of the latter kind, *i.e.*, an agreement to convey property already paid for (see *Rayner v. Preston*, 14 Ch. D. 297, 18 Ch. D. 1), would have the effect of changing the equitable ownership of the property immediately, by making the vendor a trustee for the vendee; and, therefore, any subsequent injury to the property by the act of God would fall upon the vendee. The latter has parted with his money, and he has acquired nothing in exchange for it but a right to a conveyance of the property. If the vendor be ready and willing to execute such conveyance in proper form, that is all that the vendee can require of him; and the fact that, since the payment of the money and the making of the agreement, the property has been injured by the act of God will not enable the vendee either to recover back his money, or to recover damages for a breach of the agreement. A bill to compel the performance of such an agreement has indeed the characteristics of a bill by a *cestui que trust* against a trustee, rather than of a bill for the specific performance of a contract.

since the performance which equity enforces, in cases of contracts and other obligations, is no more specific than it is in other cases. The answer to this question seems to be that the term "specific performance" is used, not to indicate the nature of the relief given by equity, but to indicate the reason and the object of the jurisdiction assumed by equity, — the reason being that a compensation in money is an inadequate remedy, and the object therefore being to afford a remedy by way of specific performance or specific reparation. In other words, the term "specific performance" is used, not to indicate that the relief given by equity in such cases differs from the relief which equity gives in other cases, but to mark the distinction between the relief given by equity and the relief given at law in such cases. Accordingly, when (as is often the case) equity assumes jurisdiction over contracts and other obligations, not because a compensation in money is an inadequate remedy for a breach, but for some other reason, — when in fact the relief given is the same in equity as at law, namely, a compensation in money, — the jurisdiction is never designated by the term "specific performance."

The preceding article comprised all that it was proposed to say upon the subject of specific performance ; but it remains to speak of three important classes of cases in which equity assumes jurisdiction over contracts or other obligations, and yet gives no other relief than a compensation in money ; namely, first, bills for an account ; secondly, bills in the nature of an action of assumpsit, or bills of equitable assumpsit ; thirdly, creditors' bills, *i.e.*, bills filed by creditors of persons deceased against the executors or administrators of the debtors to compel the payment of the debts.

BILLS FOR AN ACCOUNT.

Every bill for an account must be founded upon an obligation to render an account. What then is the nature of such an obligation, and when does it exist ? In strictness this question does not belong to the subject of these articles ; but the obligation to render an account is so little understood, that a knowledge of it cannot properly be assumed. It was formerly well enough understood by common-law lawyers, but, with the disuse of the action of account, nearly all knowledge of it has been lost by them. It might be supposed that what common-law lawyers ceased to know in this regard, equity lawyers

would have learned ; but such is not the fact. Partly from an indisposition among equity lawyers to study common-law learning, which common-law lawyers regard as obsolete, and partly for another reason, the obligation to account has never been well understood by equity lawyers. The other reason is the wide, indeterminate, and vague sense in which the term "account" has always been used in equity. It has been usual to call all bills in equity which may involve a reference to a master to take an account of any kind or for any purpose (and such bills are many in number and very diverse in character) bills for an account, especially as often as it has been found necessary to give them that name in order to sustain them in point of jurisdiction ; and the fact has not been recognized that such bills are true bills for an account only when they are founded upon a legal obligation to render an account, and that in all other cases they rest upon some other principle in point of jurisdiction.

The obligation to render an account is not founded upon contract, but is created by law independently of contract. Of course there may be in terms a promise or a covenant to render an account, or a bond may be upon the condition that the obligor render an account, and such promise,¹ covenant,² or bond³ may support an action at law, but neither of them will ever create an obligation to account, any more than a promise to pay a definite sum of money will create a debt ; for if the facts from which the law raises such an obligation do not exist, the obligation will not exist, notwithstanding such promise, covenant, or bond ; and if such facts do exist, the law will raise the obligation to account independently of the promise, covenant, or bond, and the latter will be entirely collateral to the former.⁴

What then are the facts which must exist in order to induce the law to raise an obligation to account ? First, the person upon whom such an obligation is sought to be imposed (and whom we will call the defendant) must have received property of some kind not belonging to himself ; for otherwise he will have nothing to

¹ *Spurraway v. Rogers*, 12 Mod. 517 ; *Wilkin v. Wilkin*, 1 Salk. 9, 1 Show. 71, Comb. 149, Carth. 89 ; *Owston v. Ogle*, 13 East, 538 ; *Topham v. Braddick*, 1 Taunt. 572.

² *Barker v. Thorold*, 1 Wms. Saund. 47.

³ *Vere v. Smith*, 2 Lev. 5, 1 Ventr. 121 ; *Anon.* 1 L. P. R. (1st ed.), 32.

⁴ 1 Rol. Abr., *Accompt* (A), pl. 5, 8 ; *Hawkins v. Parker*, 2 Bulstr. 256, 1 Rol. Abr., *Accompt* (A), pl. 15, 1 Rol. Rep. 52 ; *Anon.*, *Dyer*, 51, pl. 14. See Bro. Abr., *Accompt* pl. 60.

account for or to render an account of. At common law there are only three classes of persons who can incur an obligation to account; namely, guardians, bailiffs, and receivers; and a guardian, a bailiff, or a receiver is a person who receives property belonging to another. As to a guardian or a receiver this is obvious; and it is equally true as to a bailiff. Indeed, "bailiff" has the same derivation and the same meaning as "bailee," each of them signifying a person to whom property is bailed or delivered.

If such be the rule at common law, of course the rule in equity must be the same in substance; for it is the common law that creates the obligation, the enforcement of it being alone the function of equity. It is not, indeed, necessary in equity to describe a defendant as a guardian, a bailiff, or a receiver, in order to maintain a bill against him for an account; nor is it necessary to show that he is one of these rather than another; but it is indispensable that he have in truth the qualities of one, of two, or of all three of these classes of persons.

The distinctions between a bailiff and a receiver are important. A receiver is one who receives money belonging to another for the sole purpose of keeping it safely and paying it over to its owner. If the thing received be anything else than money, the receiver is a bailiff; and so he is, though the thing received be money, if he have any other duty to perform respecting it than that of keeping it safely and paying it over,—if, *e.g.*, he be bound to employ it for the profit of its owner; and hence the rule that a receiver *ad merchandisandum* is a bailiff.¹ Moreover, whether a person be accountable for property as a bailiff or as a receiver depends upon the original receipt, and not upon the state of things existing at the time when the question arises. Therefore, one who has received property as a bailiff is still a bailiff, though the property have all been converted into money, and the only duty remaining be to pay the money over to its owner.² In short, "once a bailiff, always a bailiff" is the rule.

The term "bailiff" is not in popular use in this country; and even in England its popular use, as applied to persons who are

¹ 1 Rol. Abr., Accompt (O), pl. 4, 5. "If a writ be against the defendant/as receiver, a declaration upon a receipt *ad merchandisandum*, for which he is chargeable as bailiff, is not good." Com. Dig., Accompt (E. 2).

² 1 Rol. Abr., Accompt (F), pl. 2, 3; Bro. Abr., Accompt, pl. 53.

under an obligation to account, is confined to persons who have charge of land belonging to others, and who are accountable for the rents and profits of such land.¹ Still, in law, both in England and in this country, every factor or commission-merchant is a bailiff in respect to the goods consigned to him for sale.²

Secondly, the person seeking to impose the obligation (and whom we will call the plaintiff) must be the owner of the property in respect to which the obligation is sought to be imposed. In other words, ownership by the plaintiff must concur with possession by the defendant. Until these two things co-exist, the obligation to account cannot exist; and when they cease to co-exist, the obligation to account will cease to exist. If, therefore, the property be received by the defendant under such circumstances that it becomes his own the moment he receives it, though it belonged to the plaintiff up to that moment, no obligation to account will ever arise. Thus, when the defendant receives money belonging to the plaintiff, but receives it under such circumstances that he has a right to appropriate it to his own use, making himself a debtor to the plaintiff to the same amount, and the defendant exercises such right, the receipt of the money will create a debt,—not an obligation to account. So if the plaintiff's title to the property be transferred to the defendant, after the latter has received it and become accountable to the plaintiff for it, the defendant's accountability for the property will from that moment cease. Thus, if the defendant sell property as the plaintiff's factor, receive the proceeds of the sale and appropriate them to his own use, debiting himself with their amount, his accountability will thereupon cease, provided he had a right to do what he has done; and he will thenceforth be a debtor only; *i. e.*, he will be accountable up to the moment when the property became his, and from that moment he will cease to be accountable and will become a debtor.

Thirdly, the defendant must not receive the property as a *mere* bailee. If, therefore, the property consist of land or of goods, the defendant must receive it either for the purpose of converting it into money by sale, or for the purpose of employing it in such a way that it may yield a profit or income for the benefit of the owner.

¹ And this popular meaning seems to have once been the legal meaning. See 1 Win. Abr., Account (X), pl. 1; Anon., Keilw. 114, pl. 51.

² See *Godfrey v. Saunders*, 3 Wilson, 73, where a factor was sued and declared against as a bailiff.

When the property consists of goods, a sale is the more common object of the defendant's employment; when it consists of land, the more common object is the receipt of the rents and profits. When the object is a sale, the defendant is accountable for the *corpus* of the property received; when the object is the receipt of the rents and profits or other income, the defendant is accountable only for the latter. When the object is a sale, the only measure of the defendant's accountability is the property received by him; when the object is the receipt of the rents and profits or other income, the defendant's accountability is measured by the length of time that his employment has continued, as well as by the property received by him.

If the property received consist of money, the defendant must not be bound to restore to the plaintiff the identical coin received by him; for, if he is, he will be a mere bailee, *e. g.*, if the money be sealed up in a bag.¹ So he must not, as has been seen, have a right to appropriate the money received to his own use, for then he can be only a debtor. But he must receive the money either to keep for the plaintiff, or to employ for the plaintiff's benefit; and yet his obligation must be capable of being discharged by returning to the plaintiff (not the identical money received, but) any money equal in amount to the sum received. For money cannot possibly be employed so as to yield a profit or income, without losing its identity; and though it may be so kept as to preserve its identity, yet the duty of so keeping it will, as has been seen, make the keeper a mere bailee. Moreover, such a mode of keeping money is very unusual, and such a mode of keeping another person's money would presumptively be very improper, for the recognized mode of keeping money is to deposit it with a banker; and yet by so depositing it its identity is lost, for the

¹ "If one receive to my use money sealed up in a bag, as my servant, account does not lie against him." F. N. B. 116 Q, n. (d). "If £40 is delivered to render account, account lies well; but if it is delivered to re-bail when defendant is required, account lies not, but detainue." Bro. Abr., Accompt, pl. 51. "If money be delivered to render an account, account lies; but if it was delivered to keep until the plaintiff shall require it, account doth not lie, but detainue." Brownl. 26. "In account as receiver, it is a good plea in bar that the money was delivered to him to carry to London to a Lombard, to make exchange, and to receive letters of exchange, and to send them to plaintiff, which he had done accordingly. For this is equivalent to saying that he never was his receiver to render account; for this was delivered to him to exchange, and not to render account." 1 Rol. Abr., Accompt (M), pl. 7. Compare 1 Rol. Abr., Accompt (N), pl. 14. See, also, F. N. B. 119 D, n. (d).

moment it is deposited it becomes the property of the banker, the latter becoming indebted to the depositor in the same amount.

It will be seen, therefore, that in respect to the question under consideration, money differs from land or goods in at least three particulars : first, a receiver of money frequently becomes a debtor instead of a bailee, though the object for which he is made receiver is safe custody merely, as in the case of a banker ; secondly, a receiver of money, not being a banker, may be, and commonly is, accountable for the money received, though he receive it for safe custody merely, because, though not a debtor, yet he is not bound to preserve the identity of the money received ; thirdly, a receiver of money, if accountable at all, is always accountable for the *corpus*, since it is impossible that a receiver of money should be bound to return the identical money received, and yet be bound to account for profits made by employing the money.

One who receives money for which he is accountable may always deposit it with a banker, and in that respect he is like one who receives money for which he becomes a debtor ; but, unlike the latter, he must never mix the money for which he is accountable with his own money ; and, therefore, he must always deposit the former to a separate account.

The measure of accountability in case of money received for safe custody merely is the amount of money received. The receiver is not accountable for profits, for he has no authority to employ the money.¹ Of course he is not bound to pay interest, *i.e.*, out of his own pocket ; for an obligation to pay interest would imply that he is a debtor. The measure of accountability in case of money received for the purpose of employing it for the benefit of the plaintiff is the amount of money received, and also the length of time that the defendant has had it.

Fourthly, in order that one may be accountable for property, he must have received it into his possession and under his control ; it is not sufficient that he merely have the custody of it as the servant of the owner.² Nor does this distinction depend at all

¹ In account as receiver, where he is not to merchandise, he is not to account for profit; *aliter*, if the receipt was to merchandise for then he hath a warrant to gain or lose. 1 Rol. Abr., Accompt (O), pl. 14, 15.

² Account "does not lie where a man has only a bare custody as a shepherd." Com. Dig., Accompt (D). "In account against a bailiff, it is a good plea that he was servant to the plaintiff to drive his plough, and had his cattle for the drawing of his plough, *absque hoc* that he was his bailiff in other manner, because he is not accountable for this occupation." 1 Rol. Abr., Accompt (L), pl. 5.

upon whether the servant be of low grade or of high grade. He may be a menial servant, or he may be the chief financial officer of a corporation, of a municipal body, or even of a sovereign State ; yet, if his only possession is his employer's possession, he is not technically accountable.¹

One need, however, have possession only of that for which he is accountable. If, therefore, one is accountable only for the rents and profits or other income of property, he need not have the legal possession of the *corpus* of that property. Indeed, a bailiff of land, as such, never has the legal possession of the land itself, but he does have the possession of the rents and profits received by him.² So one may be authorized to sell and convey land, and to deliver possession of it to the purchaser, without ever having possession of the land himself ; and yet he will be accountable for the proceeds of such sale if he be authorized to receive them into his possession and he do receive them accordingly. In such a case, however, it seems that the obligation to account does not arise until the proceeds of the sale are received, or at least not till the sale is made.

Lastly, there must be a fiduciary relation between the plaintiff and the defendant, or, as the books of the common law express it, there must be a privity between them. This requirement disposes at once of all cases in which the defendant has acquired his possession wrongfully, or in assertion of a right to the possession,³ or even without the plaintiff's permission, though without any wrongful or hostile intention.⁴ If, however, he obtain possession on the plaintiff's behalf, and as his representative, though

¹ The subjects of larceny and embezzlement furnish good illustrations of the distinction between possession and custody. One cannot be convicted of larceny, though he may be convicted of embezzlement, in respect to property of which he has the legal possession. On the other hand, one cannot be convicted of embezzlement, though he may be convicted of larceny, in respect to property of which he has the mere custody as the servant of the owner. *Commonwealth v. Berry*, 99 Mass. 428.

² Though a bailiff of land is accountable only for the rents and profits of the land, and not for the land itself, yet it is not necessary, in order to render him accountable, that he should have actually received rents and profits. The reason is, that he is accountable, not only for the rents and profits actually received by him, but for what, with reasonable diligence, he might have received. To that extent, therefore, a bailiff of land is an exception to the rule that, in order to render A accountable to B, he must have received possession of property belonging to B.

³ *Anon.*, 1 Leon. 266. — "Account does not lie where a man claims the property." *Com. Dig.*, Accompt (D).

⁴ *Tottenham v. Bedingfield*, 3 Leon. 24, Owen, 35, 83.

without any actual authority, the plaintiff may adopt and ratify his acts, and thus establish privity between him and the plaintiff.¹ So if A collect a debt due to me, it has been held that I may elect whether I will compel the debtor to pay the debt to me, notwithstanding that he has paid it to A, or whether I will adopt the act of A, and compel him to account to me for the money collected ;² for, though A has received the money, yet he has not done any wrong to me, as it is not my money until it is paid to me ; and when no wrong is done to me, I may make a privity by my consent.³

If money be delivered by A to B in order that it may be delivered by B to C,⁴ or if it be delivered by A to B to the use of C,⁵ it has often been held that B will be accountable to C. If, however, he fail to deliver the money to C, he will be accountable for it to A.⁶

¹ "Where a man takes upon him of his own head to be my bailiff, account lies." Bro. Abr., Accompt, pl. 8. "If a man claims to be guardian of an infant, and is not, and enters and occupies, action of waste lies, and therefore action of account, as it seems; and *contra* where he enters as trespasser. Note a difference." Bro. Abr., Accompt, pl. 93. "If a man enter into my land to my use, and receive the profits thereof, I shall have an account against him as bailiff." F. N. B. 117 A.

² "If a man receive the rent due from my lessee for life, or my tenants, account lies against him as receiver." 1 Rol. Abr., Accompt (H), pl. 2. "If a man receive my rent of my tenants without my assent, yet I shall charge him by the possession and by the receipt. *Per* Bryan, C. J. And so see that never his receiver to render account shall not serve in this case for him." Bro. Abr., Accompt, pl. 65; 1 Vin. Abr., Account (A), pl. 7, note.

³ *Tottenham v. Bedingfield*, 3 Leon. 24, *per* Manwood, J.

⁴ "I command you to receive my rents and deliver them to Lord Dyer, he shall have account against you; yet he did not bail the money." *Per* Lord Brooke, in *Paschall v. Keterich*, Dyer, 152, note. "If a man deliver money to you to pay to me, I shall have account for this against you." 1 Rol. Abr., Accompt (A), pl. 6; 1 Vin. Abr., Account (A), pl. 6.

⁵ "A man shall have a writ of account against one as bailiff or receiver, where he was not his bailiff or receiver; for if a man receive money for my use, I shall have an account against him as receiver; or if a man deliver money to one to deliver over to me, I shall have an account against him as my receiver." F. N. B. 116 Q. "If £10 be paid to W. N. to my use, I may have account against W. N. of it." Bro. Abr., Accompt, pl. 61. And see *Cocket v. Robston*, 3 Leon. 149, Cro. Eliz. 82.

⁶ "It is a good plea that it was delivered to deliver over, to whom he hath delivered it accordingly, because he was never accountable for it but conditionally; namely, if he did not deliver it over." 1 Rol. Abr., Accompt (M), pl. 2. "In account defendant said they were bailed to him to bail over to J. S., which he had done. Plaintiff said that, after the delivery to defendant, and before the delivery over, he commanded him to bail it to him; and a good replication by the best opinion; for by the delivery to the defendant, J. S. has no property in it, and therefore plaintiff may countermand it; and yet by this delivery to defendant, J. S. may have account, if it be not countermanded." Bro. Abr., Replication, pl. 65.

If A be accountable to B, and B be accountable to C, this does not make A accountable to C for want of privity. Therefore, if B be the bailiff or receiver of C, and A be the deputy of B, A will be accountable to B alone, and B will be accountable to C, just as if there were no deputy.¹

The privity required by the common law to support an obligation to account was so strictly a personal relation that neither the right created nor the duty imposed by the obligation could be transferred even by an act of law; and hence, upon the death of the obligee, the obligation could not be enforced by his executor or administrator; and upon the death of the obligor, the obligation could not be enforced against his executor or administrator. As to the executor or administrator of the obligee, this rule was abrogated by early statutes;² but as to the executor or administrator of the obligor, it remained in force until the passage of the well-known act³ for the amendment of the law in 1705. It seems, however, that equity would enforce such an obligation against the executor or administrator of the obligor even before the passage of that statute.⁴

It is worthy of observation that while the obligation to account is created by law, yet the privity without which such an obligation cannot exist is, as a rule, created by the parties to the obligation. There are, however, exceptions to that rule; for, in the case of guardians, the privity is created by law,⁵ and in one class of cases it is created by the statute just referred to; namely, where one of two joint-tenants, or tenants in common, receives "more than comes to his just share or proportion."

Such then being the facts from which the law will raise an obligation to account, the next question is, How can such an obligation be enforced, or what is the remedy upon such an obligation? It

¹ F. N. B. 119 B; 1 Rol. Abr., Accompt (E), pl. 4; The Queen and Painter's Case, 4 Leon. 32; s. c., *nom.* Sir W. Pelham's Case, 4 Leon. 114.

² Westm. 2 (13 Ed. I.), c. 23; 25 Ed. III., stat. 5, c. 5; 31 Ed. III., stat. 1, c. 11.

³ 4 Anne, c. 16, s. 27.

⁴ Co. Litt. 90 b, n. 5 (by Hargrave); Lee v. Bowler, Cas. t. Finch, 125; Holstcomb v. Rivers, 1 Ch. Cas. 127, 1 Eq. Cas. Abr. 5; Burgh v. Wentworth, Cary (ed. of 1650), 54.

⁵ "To maintain an action of account, there must be either a privity in deed by the consent of the party, for against a disseisor, or other wrongdoer, no account doth lie; or a privity in law, *ex provisione legis*, made by the law, as against a guardian, etc." Co. Litt. 172 a,

is obvious that the only adequate remedy is specific performance, or at least specific reparation. An action on the case to recover damages for a breach of the obligation, even if such an action would lie, would be clearly inadequate, as it would involve the necessity of investigating all the items of the account for the purpose of ascertaining the amount of the damages, and that a jury is not competent to do. In truth, however, such an action will not lie.¹ If, indeed, there be an actual promise to account, either express or implied in fact, an action will lie for the breach of that promise; but as such a promise is entirely collateral to the obligation to account, and as therefore a recovery on the promise would be no bar to an action on the obligation, it would seem that nominal damages only could be recovered in an action on the promise, or at most only such special damages as the plaintiff had suffered by the breach of the promise.² Besides, the first instance in which an action on such a promise was sustained was as late as the time of Lord Holt,³ while the obligation to account has existed and been recognized from early times.

Accordingly, the common law provided an action whose sole object was the enforcement of obligations to account, namely, the action of account; and the relief afforded in that action consisted in compelling the defendant to account with the plaintiff. It is true that this is a kind of relief for which the machinery and the methods of the common-law courts are very ill fitted, and which, at the present day, they never attempt to give; but they did attempt it in early times in the instance of the action of account, there being then no courts of equity. The action, unlike ordinary actions at law, consisted of two stages. The object of the first stage was to ascertain and decide whether or not the defendant was bound to account with the plaintiff; and, accordingly, to that point, the pleadings were directed. The declaration charged the defendant with being the plaintiff's guardian, bailiff, or receiver. The defendant might either deny the charge (*i. e.*, deny that he had ever been such guardian, bailiff, or receiver, and hence that he had ever incurred an obligation to account with the plaintiff), or he might plead an affirmative defence, namely, that the obligation which confessedly once existed had ceased to exist, *e.g.*, that

¹ *Spuraway v. Rogers*, 12 Mod. 517.

² *Wilkyns v. Wilkyns*, Carth. 89.

³ *Wilkyns v. Wilkyns*, *supra*.

it had been extinguished by a release, or that it had been performed by an actual accounting with the plaintiff. This latter defence was set up by a plea of *plene computavit*, as it was called, *i.e.*, that the defendant had fully accounted with the plaintiff; and to establish this defence the defendant must show that he and the plaintiff had agreed upon all the items of the account, and had struck a balance; for an accounting must either be before a competent court, or by the act and agreement of the parties.

If the pleadings resulted in an issue of fact, it was tried by a jury, as in ordinary cases; if in an issue of law, it was tried by the court. If the issue was decided in the defendant's favor, a final judgment in his favor was rendered; if in the plaintiff's favor, an interlocutory judgment was rendered, namely, that the defendant do account, *quod computet*. Upon this judgment being rendered, the defendant, unless he gave bail, was committed to prison, and kept in prison until the account was taken, a final judgment rendered, and that judgment satisfied.¹

The account was taken by auditors appointed by the court, who always consisted of two or more clerks of the court. The account commonly consisted of two classes of items, namely, items of charge and items of discharge. The former consisted of sums of money received by the defendant, and with which he was consequently chargeable. The latter consisted (besides charges for services) of sums of money paid out by the defendant on the plaintiff's account, and which were therefore to be allowed to the defendant, *i.e.*, deducted from the amount with which he would otherwise be chargeable. The theory of these items of discharge was that they were paid by the defendant, not out of his own pocket, but out of the money in his hands belonging to the plaintiff; and hence they did not constitute independent claims in favor of the defendant and against the plaintiff, but were mere items in the account; and the only way in which the defendant could enforce them or avail himself of them, was by procuring them to be allowed in his account. And this was so, even though, as sometimes happened, the defendant's payments exceeded his receipts, so that the balance was in the defendant's favor; in which case the defendant was said to be in surplusage to the plaintiff. This would seem to show that a person subject to

¹ *Robsert v. Andrews*, Cro. Eliz. 82; *Pierce v. Clark*, 1 Lutw. 58.

an obligation to account, who had authority to make payments on behalf of the obligee, was entitled to bring an action of account against the latter, alleging that there was a balance in his favor; but this is doubtful upon authority.¹

If the money or other property for which the defendant was accountable had been lost without his fault, he was not liable for it; and therefore proof that it had been so lost always constituted a good account.²

When a proper account had been taken by the auditors and delivered into court, if it showed a balance in the plaintiff's favor, a final judgment was rendered that the plaintiff recover such balance; but if the account showed a balance in the defendant's favor, all that the court could do for him was to dismiss him with costs; it could not render a judgment that he recover such balance, as it could render such a judgment only in favor of a plaintiff. Since, however, the taking of the account had converted the balance in the defendant's favor into a debt, the defendant could enforce payment of it by an action of debt³ or of *indebitatus assumpsit*.

Are there any other common-law actions that will lie upon an obligation to account? The only other actions which it has ever been supposed would lie are debt and *indebitatus assumpsit*; but to sustain either of these actions, a debt is indispensable; and to say that an obligation to account can ever constitute a debt is a plain contradiction. An obligation to account may, indeed, be converted into a debt; and when that is done, of course debt or *indebitatus assumpsit* will lie. Thus, if a defendant, having money in his hands for which he is bound to account to the plaintiff, appropriates or converts such money to his own use, the plaintiff, if the amount of the money be definite and certain, so that no account is necessary to ascertain its amount, may adopt and sanction the defendant's wrongful act, and thus convert the defendant into a debtor;⁴ and it seems that a demand

¹ F. N. B. 116 Q, n. (c).

² Vere v. Smith, 2 Lev. 5; 1 Vent. 121.

³ Gawton v. Lord Dacres, 1 Leon. 219; s. c., *nom.* Lord Dacres' Case, Owen, 23; Bro. Abr., Accompt, pl. 62, Dette, pl. 130, 182, Ley Gager, pl. 62, 65.

⁴ Lamine v. Dorrell, 2 Ld. Raym. 1216. "If I deliver money to a man to deliver over, and he doth not, but converts the money to his own use, I may elect to have an action of account against him, or an action on my case; but a stranger hath no other remedy than an action of account." *Per* Frowyk, C. J. Anon., Keilw. 77 a, 77 b, pl. 25, Mich. 21 H. 7.

of payment by the plaintiff, and a refusal or failure to pay by the defendant, will establish a conversion, and thus enable the plaintiff, at his option, to maintain debt or *indebitatus assumpsit*. In this class of cases, therefore, the misconduct of the defendant enables the plaintiff to elect between holding the defendant to his obligation to account, and converting him into a debtor.

There is also a class of cases in which the obligor has an election to convert an obligation to account into a debt, namely, the class of cases, before referred to, in which one who has received specific property, for which he is accountable, and has converted the same into money, is entitled to appropriate the money to his own use, and does so. In such cases, however, the plaintiff is still entitled to enforce the obligation to account for the purpose of ascertaining the amount for which the defendant is liable, though it is only as a debt that he can enforce payment of the amount which the defendant has rightfully appropriated to his own use.

Of course both parties to an obligation to account may always convert such obligation into a debt, by agreeing that the obligor shall retain, as his own, the property for which he is accountable, and in exchange for it shall become indebted to the obligee in an agreed amount. In this way the obligation to account is wholly extinguished, and hence the obligee can never bring any action of account. Moreover, the parties often bring about this result without any actual intention to do so, namely, by settling the account between them, and striking a balance; for in this way the obligation to account is completely performed and extinguished; and if an action of account be afterwards brought upon it, such action may be defeated by the plea of *plene computavit*. The balance therefore necessarily becomes a debt, and can be recovered only as such. In ancient times such a balance was recovered by an action, called an action of debt for the arrearages of an account. In modern times it may be recovered by an action of debt or of *indebitatus assumpsit* upon an *insimul computassent* or account stated.

All the foregoing observations are, as will be seen, entirely consistent with the rule, that an obligation to account will support no common-law action, except an action of account; and that rule is believed to be subject to no exception whatever.

Undoubtedly, the distinction between a debt and an obligation

to account is one which there is some danger of losing sight of, and this danger has been much increased by the disuse of the action of account. Moreover, this distinction has been much obscured by the prevalence of the *indebitatus* count in assumpsit for money had and received. That count, indeed, seems to have been framed in entire forgetfulness that any such distinction existed, for it alleges a legal impossibility, namely, that the defendant is indebted to the plaintiff for money had and received by the defendant *to the plaintiff's use*. If, in truth, the defendant is indebted to the plaintiff for money had and received by the defendant, it follows that the money was received by the defendant to his own use; and if the money was in truth received by the defendant to the plaintiff's use, it follows that it is the plaintiff's money, and that the defendant is accountable for it. And yet this inconsistency in the language of the count has never attracted attention. Less mischief, however, has resulted from it than might have been anticipated; for English lawyers, acting with their usual practical good sense, have treated the count as alleging an indebtedness for money had and received, and the words "to the plaintiff's use" have been disregarded. Much looseness of ideas prevailed, indeed, during the time of Lord Mansfield, and doubtless the instances have been numerous since his time in which assumpsit for money had and received has been allowed where account was the only proper action. The distinction between these two actions has, however, generally been recognized and maintained whenever attention has been properly called to it, and especially whenever substantial rights depended upon it. Thus in *Lincoln v. Parr*,¹ the court "declared their opinion that no evidence of account will maintain *indebitatus*, as on money delivered to a factor, who often have discharges of greater value, and so involve the court, which they will not allow"; "and it was said so to be ruled in Guildhall last sitting." In *Sir Paul Neal's Case*,² it was decided by all the judges of England that case would not lie against a bailiff, where allowances and deductions are to be made, unless the account had been adjusted and stated; and in *Farrington v. Lee*³ the same doctrine was held in regard to a factor; and, in the latter case, North,

¹ 2 Keb. 781.

² Cited by North, C. J., in *Farrington v. Lee*, Freem. 230.

³ 1 Mod. 268, 2 Mod. 311, Freem. 229, 234, 242.

C. J., said,¹ "If, upon an *indebitatus assumpsit*, matters are offered in evidence that lie in account, I do not allow them to be given in evidence." In Anonymous,² Powell, J., having said, "If I give money to another to buy goods for me, and he neglects to buy them, for this breach of trust I shall have election to bring debt or account," Holt, C. J., answered, "If the party did not take it as a debt, but *ad computandum* or *ad merchandisandum*, it must be an account, and he shall have the benefit of an account; which is, he may plead being robbed, which shall be a good plea in the last case, but not in the first." In *Poulter v. Cornwall*³ it was virtually admitted by the court that a count in *indebitatus assumpsit* for money had and received by the defendant *ad computandum* was bad on demurrer. Finally, in *Thomas v. Thomas*⁴ it was held, upon great consideration, that *indebitatus assumpsit* for money had and received would not lie by one tenant in common against his co-tenant, to recover the plaintiff's share of rents received by the defendant for the land held in common. In order to appreciate the force of this decision, it must be borne in mind that the plaintiff would have had no remedy at all at common law, unless he had appointed the defendant as his bailiff of his share of the land; that, without such an appointment, not even an action of account would have lain, for want of privity; but that the want of privity had been supplied by statute,⁵ and hence that the defendant was liable as the plaintiff's bailiff, just as if he had been actually appointed. The decision was, therefore, to the effect that *indebitatus assumpsit* for money had and received will not lie against a bailiff to recover money received by him as bailiff.

Allowing *indebitatus assumpsit* for money had and received to lie upon an obligation to account, involves one of two false assumptions, namely, either that such an obligation constitutes a debt, or that such an action will lie, though there be no debt. If the first

¹ 1 Mod. 268, 270.

² 11 Mod. 92.

³ 1 Salk. 9. Though the decision in this case was in the plaintiff's favor, yet it was rendered on a motion in arrest of judgment, and was based entirely on the ground that the declaration was cured by the verdict, "for it must be intended there was proof to the jury that the defendant refused to account, or had done somewhat else that had rendered him an absolute debtor."

⁴ 5 Exch. 28.

⁵ 4 Anne, ch. 16, s. 27.

assumption be made, the defendant will be deprived of the defence that the fund has been lost without his fault; and he will also be deprived of the defence that the fund, or some portion of it, has been expended by the defendant for the plaintiff and by the plaintiff's authority; unless another false assumption be made, namely, that money paid by the defendant out of the fund constitutes a debt in his favor, and so a defence by way of set-off or counter-claim. If the false assumption be made that *indebitatus assumpsit* for money had and received will lie upon an obligation to account, though such an obligation constitute no debt, that is equivalent to saying that such action shall be allowed to perform the function of an action of account, or of a bill in equity for an account. If the reader ask why not, and be not satisfied with the answer that to allow this would be to allow a plaintiff who has alleged one thing to recover upon proving a wholly different thing, it may be added, first, that nothing whatever would be gained by such a perversion of remedies; that the action of account eventually proved a failure, not because it was badly or defectively constructed, but because it attempted to accomplish what was beyond the powers of common-law courts; secondly, that the enforcement of an obligation to account necessarily involves two successive stages of litigation, with two sets of pleadings and two trials; and that only the first of the two trials is before a jury, even at common law, the second being before judicial officers, namely, before auditors. To attempt, therefore, to enforce such an obligation by an action which has but one stage of litigation, but one set of pleadings, and but one trial, would be not only to involve the court in incredible confusion in point of procedure, but to compel the defendant to account before an incompetent and illegal tribunal, namely, a jury. Yet this seems to have been the idea of Lord Mansfield, if we may judge from the case of *Dale v. Sollet*.¹

¹ 4 Burr. 2133. The defendant in this case had collected £2,000 for the plaintiff as the plaintiff's agent, and he had paid over to the plaintiff all but £40, which he claimed to retain as a compensation for his services. This latter sum the plaintiff sought to recover in an action of *assumpsit* for money had and received. The defendant having pleaded only the general issue, the plaintiff objected that, upon that issue, the defendant could not avail himself of his right of retainer, but that he should have pleaded his claim for services as a set-off. This objection, however, was overruled, Lord Mansfield saying: "The plaintiff can recover no more than he is in conscience and equity entitled to: which can be no more than what remains after deducting all just allowances which the defendant

The next question is, What is the jurisdiction of equity over obligations to account? The action of account seems to have proved a failure before any regular system of equity was established. Certainly equity never regarded that action as an adequate remedy, and therefore it always permitted an obligation to account to be enforced by bill. At first, therefore, and for a long time, courts of equity had (what is improperly called) a concurrent jurisdiction with courts of law over obligations to account. Actions of account were for a time revived to some extent in England during the present century, but, with that exception, they have been constantly on the decline; and now, so far as the writer is aware, they are everywhere either abrogated or wholly obsolete. Obligations to account now therefore furnish an instance of an important legal right with no legal remedy whatever, and hence the sole remedy is in equity. A bill in equity for an account, therefore, is simply a substitute for the action of account.

The proceedings upon a bill for an account are similar, in their main outline, to those in an action of account. Of course there are all those differences which distinguish all proceedings in a suit in equity from those in an action at law, but such differences do not require to be noticed here. The question whether the defendant is bound to account is, of course, heard by a judge, instead of being tried by a jury. If, however, this question should be found to turn upon controverted facts, it would seem to be the right of either party to have it sent to a court of law to be tried by a jury.¹ If it be decided that the defendant shall account, the court makes a decree, referring the cause to a master to take the account, instead of appointing auditors as at law.

If, upon the accounting, the defendant be found to be in surpluse to the plaintiff, he is entitled to a decree against the plaintiff for the balance due to him. This is upon the same principle upon which the defendant may have a decree in his favor upon a bill for specific performance, and which has been already explained.² It would seem to follow, therefore, that a

has a right to retain out of the very sum demanded. This is not in the nature of a cross-demand or mutual debt: it is a charge, which makes the sum of money received for the plaintiff's use so much less." ⁶ There is but one criticism to be made upon this very characteristic language, namely, that the action was *indebitatus assumpsit*, — not account.

¹ Note to *Holstcomb v. Rivers*, 1 Eq. Cases Abr. 5.

² See Vol. I. pp. 361, 362.

person subject to an obligation to account, and who claims to be in surplusage to the obligee, may himself file a bill against the obligee to have his accounts taken, and to have a decree for the payment of such balance as shall be found to be due to him ;¹ for otherwise he would seem to be without remedy, in case the obligee do not choose to file a bill.

A defendant to a bill for an account, as well as a defendant in an action of account, may account fully by showing that all the property for which he was accountable has been sold, and its proceeds received ; that, upon receiving such proceeds, he was entitled to appropriate them to his own use, debiting himself and crediting the plaintiff with their amount, and that he did so ; but the consequences of such an accounting upon a bill for an account are different from what they are in an action of account ; for, while in the latter, as we have seen, the plaintiff can obtain nothing but the accounting, and must bring a separate action of debt or *indebitatus assumpsit* to recover the debt, upon the former, the accounting will be followed up by a decree for the payment of the debt ; and this is done for the purpose of avoiding a multiplicity of actions, equity never sending a plaintiff to a court of law to finish what equity has begun.

It remains to inquire against what classes of persons a bill for an account will lie. The two most ancient as well as most typical classes are guardians (including committees of lunatics and other persons of unsound mind), and agents, stewards, or bailiffs of landed estates.² Bills against the first of these two classes are much less common in this country than in England, as such persons in this country more frequently settle their accounts in probate courts or in other inferior and local courts. Bills against the second class of persons are also much less numerous in this country than in England, because such persons are themselves

¹ There is, however, a singular dearth of authority upon the proposition stated in the text. In *Dinwiddie v. Bailey*, 6 Ves. 136, the plaintiff's counsel said (p. 139) : " There have been many bills of this nature [*i. e.*, bills for an account] by stewards for an account between them and their employers, as to receiving rents and paying sums of money. The defendants must make out that the court will not entertain a bill for an account at the suit of an accounting party." Though the decision was against the plaintiff, and though no authority was cited in support of the statement that there had been many bills for an account by stewards, yet the accuracy of that statement was not questioned either by Lord Eldon or by the defendant's counsel.

² *Makepeace v. Rogers*, 4 De G., J. & S. 649.

much less numerous. In England, much the greater part of all the landed property in the kingdom is managed by such agents. They reside upon the estate for which they are agent, have an office or counting-house, keep a set of books, and represent the owner of the estate in all business transactions between him and his tenants. As agents they keep an account with their banker, to the credit of which they deposit all rents collected from the tenants of the estate, and against which they draw cheques in payment of all expenses incurred on behalf of the estate. What remains represents the net income of the estate, and of course belongs to the owner of the estate; and any mixing by such agents of the owner's money with their own is a fraud on their part.¹

The largest and most important class of persons, however, against whom bills for an account will lie, are agents who make it their business, or at least a part of their business, to receive the property of others into their possession for the purpose of selling it, and who are paid for their services by a fixed commission on the proceeds of sales made by them. Agents of this class comprise, not only factors or commission merchants,² but auctioneers³ (*i. e.*, when they receive into their own possession the property to be sold by them), stock-brokers⁴ (*i. e.*, when employed to sell stocks, shares, or securities), bill-brokers or note-brokers,⁵ employed to sell bills of exchange or promissory notes, and book-publishers⁶ (*i. e.*, when they publish a book for its author, and sell it for him on commission).

It may be regarded as clear that all agents of the kind just referred to have a right, when they receive the proceeds of property sold by them, to appropriate such proceeds to their own use, debiting themselves and crediting their principals with the amount

¹ See *Salisbury v. Cecil*, 1 Cox, 277.

² *Mackenzie v. Johnston*, 4 Madd. 373.

³ *Commonwealth v. Stearns*, 2 Met. 343.

⁴ It seems therefore that, in *King v. Rossett*, 2 Y. & J. 33, the plaintiff was entitled to an account of the stock sold by the defendants for him. See *infra*, n. 6.

⁵ *Commonwealth v. Foster*, 107 Mass. 221.

⁶ It seems therefore that, in *Barry v. Stevens*, 31 Beav. 258, the plaintiff was entitled to an account. In that case, as in *King v. Rossett*, *supra*, if there was thought to have been no good reason for filing the bill, the court could have met the justice of the case by requiring the plaintiff to pay costs. In each case, the plaintiff's chief object probably was to obtain an injunction against an action at law brought by the defendant to recover a balance claimed to be due to him; and clearly the plaintiff was not entitled to that in either case.

so received and appropriated.¹ The business of such agents is uniformly conducted on the theory that they have such a right, and it would not be practicable for them to conduct it on the opposite theory; for if they were bound to regard the proceeds of all goods sold by them as belonging to the owner of the goods, it would be necessary for them to open a separate bank-account for every customer. This right, however, is strictly personal to the agent, and he may refrain from exercising it if he choose. It cannot be said, therefore, as matter of law, that the proceeds of every sale made by such agent become *ipso facto* the property of the agent the moment they are received by him. Still, there is a presumption that they do, because there is a presumption that the agent exercises his right of making them his own. Consequently the principals of such agents have a choice of two remedies for recovering the proceeds of their property sold by their agents; namely, a bill in equity for an account of the property sold, or an action of debt or *indebitatus assumpsit* for the recovery of the debt.² If there is a controversy as to the amount which the principal is entitled to receive, the former is the proper remedy; if there is not, the latter is abundantly sufficient.

What is said in the preceding paragraph, however, has no application to an agent who is specially employed to sell property, and not as a part of his regular business; for such an agent is accountable for the proceeds of the property sold as well as for the property itself.³

A stock-broker who is employed to buy stocks, shares, or securities is not accountable to his customer for the money received by him for the latter; for the course of business is for the broker to buy in his own name and on his own credit and responsibility, and to debit his customer with the price; and then, when the money is received from the customer, the latter is credited with the amount received. And even if the customer furnish the money in advance of the purchase, yet the course of business is the same, *i.e.*, the broker credits the customer with the amount

¹ *Scott v. Surman*, Willes, 400; *Dumas, ex parte*, 1 Atk. 232, 234; *Kirkham v. Peel*, 44 L. T. Reports, N. S., 195; *Commonwealth v. Stearns*, 2 Met. 343. A different view was expressed by Lord Cottenham, in *Foley v. Hill*, 2 H. L. Cas. 28, 35, but it was entirely *obiter*.

² *Wells v. Ross*, 7 Taunt. 403.

³ *Commonwealth v. Foster*, 107 Mass, 221.

received from the latter, and when the purchase is made, he debits him with the price ; so that the relation between the two is never any other than that of debtor and creditor.

When a book is published and sold by the publisher on his own account, under an agreement by him with the author to pay the latter either a fixed sum for every copy sold, or a fixed percentage of the gross proceeds of sales, the publisher is not accountable to the author, for the books sold (and hence their proceeds) are the property of the publisher — not of the author ; and the money payable to the latter is merely the price of his copyright in the books sold. The relation, therefore, between the publisher and the author in such a case is merely that of debtor and creditor. The same is true also of a manufacturer who works a patent, under an agreement with the patentee to pay him a royalty on all the patented articles manufactured and sold.¹ If indeed the author or the patentee were by the agreement entitled specifically to a share of the net proceeds of sales,² he would be a co-owner of such net proceeds with the publisher or manufacturer, and, as the agreement would establish a fiduciary relation between the former and the latter, the former would be entitled to an account and payment of his share.

An insurance broker, according to the practice at Lloyds, is not accountable to his principal for money received by him from underwriters in payment of losses ; for the broker effects all insurances on his own responsibility, crediting the underwriters and debiting the assured with the amount of the premiums ; and, when a loss happens, he debits the underwriters and credits the assured with its amount. The broker therefore deals as a principal both with the underwriter and with the assured, and his relation with each is simply that of debtor and creditor ; and the underwriter and the assured are strangers to each other.³

The relation between a banker and his customers is so plainly that of debtor and creditor, that one is surprised at finding that the former was ever supposed to be accountable to the latter ; and yet a case was carried to the House of Lords mainly on that question.⁴ Money deposited by a customer with his banker must

¹ *Moxon v. Bright*, L. R. 4 Ch. 292.

² Such was the fact in the late case of *Pratt v. Tuttle*, 136 Mass. 233.

³ *Dinwiddie v. Bailey*, 6 Ves. 136.

⁴ *Foley v. Hill*, 2 H. L. Cas. 28.

either become the banker's own money or it must be a special deposit in his hands; and in neither case would the banker be accountable for the money, for in the one case he would be a mere debtor, and in the other he would be a mere bailee.

Co-owners of property as such are not accountable to each other. Before the statute of 4 Anne, c. 16, s. 27, if land, owned (*e. g.*) by two persons in equal but undivided shares, was under lease, and one of them received all the rent without the authority of the other, the other had no remedy at law, for want of privity; and, though he had a remedy in equity, it was by a bill in the nature of a bill for partition, and not by a bill for an account. If he received the other's share of the rent by his authority and appointment, he was bound to account for it to the latter as the latter's bailiff. If the property was not under lease, and one of the co-owners alone occupied it, he might occupy the other's share as his bailiff, or he might occupy alone, simply because the other did not occupy, or he might exclude the other. In the first of these cases, the one occupying was bound to account with the other as his bailiff for the profits of the other's half of the property.¹ In the second case, the one occupying was not liable to the other in any way, either at law or in equity.² He was not accountable to the other, not only for want of privity between them, but also because he had received nothing belonging to the other. In the third case, the one occupying was liable to the other for a tort, but of course he was not accountable to him. In only two of the five cases just stated, therefore, could either an action of account or a bill for an account be maintained before the statute. In which of the other three cases did the statute enable the action and the bill to be maintained? Only in the first of the five. Why in that? Because the only obstacle before the statute was want of privity, and that obstacle was removed by the statute.³ Why not in the last but one of the five? Because in that case there was an additional obstacle which was not removed by the statute, namely, that the defendant had *received* nothing belonging to the plaintiff, and

¹ It is on this principle that the managing owner of a vessel (called the ship's husband) is accountable to his co-owners. Maclachlan, Merchant-Shipping (2d ed.,) 175; Davis *v.* Johnston, 4 Sim. 539.

² "Two joint-tenants; the one takes the whole profits; no remedy for the other, except it were done by agreement or promise of account." Anon., Cary (ed. of 1820), p. 29, June 8, 1602, 44 Eliz.

³ See Thomas *v.* Thomas, 5 Exch. 28.

hence that he had not, in the words of the statute, received more than came to his just share or proportion.¹

If one of two co-owners of property authorize the other to sell his share and receive the proceeds of the sale, and the latter do so, of course he will be accountable to the former for the share sold; and the case will not be altered if the one who receives the authority sells the entire interest in the property, *i. e.*, his own share as well as the other's share; for he will then make the sale in two capacities, *i. e.*, he will sell his own share as owner and the other's share as the other's agent. It is on this principle that, when a merchant in one country consigns goods to a merchant in another country to be sold on the joint account of the consignor and the consignee, the latter is accountable to the former for the former's share of the goods. Such a transaction is commonly known as a joint adventure. The consignee acts for himself as to his own share of the goods, and as the other's factor as to the other's share.²

If one of two co-owners of property sell the property without any authority from the other, the sale will be effective as to his own share only (and hence the other co-owner will not be affected by the sale),³ unless the property be of a kind which passes by delivery, and as to which possession proves ownership, *e. g.*, money or negotiable securities. If the property be of this latter kind,

¹ Eason *v.* Henderson, 12 Q. B. 986, 17 Q. B. 701; M'Mahon *v.* Burchell, 2 Ph. 127.

² Hackwell *v.* Eastman, Cro. Jac. 410, 1 Rol. Rep. 421; 1 Vin. Abr., Account (E), pl. 2, note. In such cases the consignor often incurs, in the first instance, the entire expense of the consignment, purchasing the goods with his own money or on his own credit, or furnishing them out of his own stock, and debiting the consignee with one half of the cost in the one case, and of the value in the other, as well as with one half of the incidental expenses of the consignment incurred by the consignor. Under such circumstances, therefore, the consignee incurs a double liability to the consignor, *i. e.*, he becomes *indebted* to him for his own half of the goods, and *accountable* to him for the consignor's half. Such were the circumstances in Baxter *v.* Hozier, 5 Bing. N. C. 288; and all the difficulties in that case arose from not attending to the distinction just stated. In fact, the consignors misconceived their remedy. Instead of bringing an action for an account of their own share of the goods (as to which there was no controversy), they should have brought an action of debt or of *indebitatus assumpsit* to recover payment for the consignees' share, the latter claiming that the goods were consigned to them, not on the joint account of the consignors and themselves, but solely as the factors of the consignors.

³ "It was holden clear upon the evidence that if two men buy corn jointly, as barley or the like, the one shall not have account against his fellow for the disposal of this." Michael Dent's Case, Clayton, 50, August, 13 Car. I, *coram* Berkeley, J. But see the observations of Willes, C. J., in Wheeler *v.* Horne, Willes, 208, 209.

and hence the title of the other co-owner is divested by the sale, he will be entitled to the same share of the proceeds of the sale that he had in the property before the sale; and, therefore, he can maintain a bill for a division of such proceeds; but he cannot, even in that case, maintain a bill for an account for want of privity, the statute of 4 Anne, c. 16, s. 27, being, it seems, not applicable to such a case.¹

Copartners differ from co-owners in this respect, among others, that, while one of two co-owners is sometimes accountable to the other, one of two copartners never is. The reader may be surprised at this statement, but it is believed to be strictly true.² There are insuperable objections to a bill for an account by one of two copartners against the other. First, the property of which an account is sought is as much in the possession of the plaintiff as of the defendant. Secondly, the plaintiff is neither the sole owner of the partnership property, nor the owner of any fixed share of it. What, then, shall he have an account of? Thirdly, if one of two copartners is accountable to the other, the other, *pari ratione*, is accountable to him; and hence we have two persons accountable to each other for the same thing and at the same time. Fourthly, an account by one of two copartners with the other will establish nothing, nor produce any result, unless the other also account with him. The truth is, the ordinary bill by one or more partners against the other or others is not a bill for an account, but a bill for the partition or division of the partnership assets among the partners; and this explains the fact that such a bill cannot be maintained without a dissolution of the partnership.³ In order to ascertain how the assets shall be divided, there must, indeed, be an accounting (so called); but it is an accounting between each partner, on the one hand, and the firm, considered as a distinct person, on the other hand; and the relation between the several partners and the firm is that of debtor and creditor, and is not a relation created by an obligation to account.

The relation between a commercial traveller and his employer is merely that of debtor and creditor, even though the former be

¹ See Lindley, Partn. (4th ed.), p. 64.

² "No instance of an action of account brought by one partner against another is known to the writer." Lindley, Partn. (4th ed.), p. 1022, n. k.

³ *Roberts v. Eberhardt*, Kay, 148, 157-8.

paid for his services by a commission on the sales made through him ;¹ but if, by the agreement, he were entitled specifically to a share of the proceeds of such sales, he could maintain a bill for an account.²

A trustee is obviously under an obligation to account with his *cestui que trust* for the trust property or its income ; but this obligation is merely equitable, and therefore a bill by a *cestui que trust* against his trustee is never a bill for an account in point of jurisdiction.

An executor or administrator is under a legal duty to pay or deliver over the personal property of his testator or intestate, after payment of debts, to the legatees or next of kin, and the latter may maintain a bill to compel a performance of this duty ; but such a bill is not a bill for an account. The reasons why it is not are several, but there is one which is alone sufficient in this connection, namely, that the jurisdiction over such bills was derived by equity from the canon or ecclesiastical law. If, however, a testator by his will give to A the proceeds of certain land which he directs his executor to sell, and the executor sell the same accordingly, and receive the proceeds, though there is no doubt that A can maintain a bill against the executor to recover such proceeds, it is not so clear what will be the true nature of such a bill in point of jurisdiction. The question depends upon whether the case would formerly have belonged to the common-law courts (in which case the remedy would have been an action of account), or to the ecclesiastical courts, the gift being regarded as a legacy. It seems to be pretty well settled that the former is the correct view.³

An attorney-at-law who collects money for a client is bound to pay it over to his client at the earliest opportunity ; and in the mean time he must not mix it with his own money. A bill for an account will therefore lie against him. So, it seems, a sheriff is accountable to the judgment creditor for the proceeds of property levied upon and sold by the former under an execution.⁴ In the case of a sheriff, however, as well as in that of an attorney, there is a summary remedy in the court out of which the execu-

¹ *Smith v. Leveaux*, 2 De G., J. & S. 1.

² See *supra*, p. 262, and n. 2.

³ *Paschall v. Keterich*, Dyer, 151 b; *Barker v. May*, 9 B. & Cr. 489. But see *Anon.*, Dyer, 264 b; *Dens v. Dens*, 1 Bulstr. 153.

⁴ *Speake v. Richards*, Hobart, 206; 1 Vin. Abr., Account (D), pl. 9.

tion issues, or of which the attorney is an officer, which renders an action or suit against either seldom necessary. Moreover, if an action or suit is to be brought, an action of *indebitatus assumpsit* will generally be more convenient than a suit in equity; and to render such an action available, it seems only necessary for the plaintiff to make a demand before suing.

A stakeholder is clearly not entitled to debit himself with the stakes received by him, and therefore he is accountable for them;¹ and, though here also an action of *indebitatus assumpsit* will generally be more convenient than a bill for an account, yet a previous demand ought to be a necessary condition of maintaining such an action.

C. C. Langdell.

CAMBRIDGE,

[To be continued.]

LIMITATIONS IMPOSED BY THE FEDERAL CONSTITUTION ON THE RIGHT OF THE STATES TO ENACT QUARANTINE LAWS.

I.

THE subject will be treated in the following order : —

(1.) The nature of quarantine laws, and their classification in our constitutional law. This involves

(2.) The nature of the police power, and its distribution in our system of government.

(3.) The limitations imposed by the Constitution upon the police power of the States, applicable to quarantine laws. Under this head will be considered the effect of the power of Congress to regulate commerce; upon the rights of the States to enact these laws; when State quarantine regulations become unconstitutional on account of the scope of their provisions, or the purposes of their enactment; and, lastly, the effect of quarantine legislation by Congress, and the actual legislation of Congress upon this subject.

The term "quarantine" is derived through the monkish Latin

¹ Baynton v. Cheek, Styles, 353.

and Italian, *quarantina*, from the Latin, *quadraginta*, indicating the period of forty days of detention originally imposed upon vessels suspected of being infected with malignant disease. A quarantine law may be defined as a regulation interdicting for a certain period communication with persons or property arriving from places considered to be either infected with contagious disease, or dangerously liable to such infection. Such laws usually provide for the examination of the individuals and property detained in quarantine, the isolation of patients having the disease, and such disinfection as the examining officers deem necessary. The expenses of maintaining the quarantine are defrayed by fees collected for the purpose from the owners of the property, usually of the ships, so detained. While in its inception, and still, for the most part confined in operation to maritime transportation, quarantining by inland cities against places in the interior, as well as on the coast, has been quite common in the United States during seasons of epidemic. More serious questions are likely to arise from land than from sea quarantines, for in the former case more stringent regulations are usually necessary. It is said that the earliest systematic quarantine regulations were instituted by the Venetians, in the year 1484, to guard against the plague. Systematic quarantine was not enforced in England before 1720.¹ Perhaps the first in this country was that of New York, established in 1784, thus antedating the Federal Constitution by five years.

The establishment of quarantines came inevitably with the extension of trade, and we may expect the questions connected with them to become more important with the growth of commerce. An inquiry into the constitutional limitations of quarantine regulations is given serious, practical interest by the gross abuses of the right which have occurred during popular panics incident to epidemics. For example, on account of a single suspected case of yellow fever in New Orleans, Galveston has suspended all intercourse by water between the two cities. In some cases, even the passing through of trains from infected points has been forbidden, with the harrowing result of preventing the escape of the imprisoned inhabitants to latitudes of safety. Quarantines have been frequently resorted to as reprisals, for purposes of commercial retaliation. On this ground cities gravely infected have de-

¹ McCulloch's Commercial Dictionary, art. Quarantine.

clared quarantines against places where the disease was not even suspected. In 1878 the city of Mobile proclaimed a quarantine against all points upon the Mobile and Ohio railroad, admitting only through freight from beyond the Ohio river, a distance of four hundred and seventy miles, through four States, there being not a case of the disease along the whole line.¹ Such examples might be multiplied. The question, what are the constitutional rights of municipalities in the matter of quarantine, apart from additional limitations imposed by State Constitutions, is the same as, what are the rights of the States themselves, for municipalities have no lawful power over the subject beyond that which is delegated to them by the State. In the examination of this question, only those constitutional limitations need be considered here which apply to quarantine laws as such. It is of course possible for a quarantine law to be unconstitutional on account of the insertion of extraordinary provisions; in no way appropriate or proper to quarantine regulation; as, for example, imposing a tonnage tax in order to defray quarantine expenses.² A large part of the constitutional prohibitions upon the States can be violated in the name of a quarantine law; but the unconstitutional provisions would be intrinsically foreign to the purposes of quarantine, and no more to be expected in a quarantine law than in any other.

In its effect upon the *status* of persons or property coming from the district quarantined against, a declaration of quarantine has been well compared to a declaration of war. The rights of persons are determined by the fact that they or their goods come from a certain place at a certain time. A State threatened with the introduction of an epidemic disease is in a position very similar to that of a State in imminent danger of armed invasion.³ Declaring a quarantine is an administrative as opposed to a judicial act.⁴

¹ 4 Ala. St. Bar Ass'n, pp. 136, 137, 142.

² *Peete v. Morgan*, 19 Wall. 581 (1873). It is said by the court, in *Morgan v. Louisiana*, 118 U. S. 455, 463 (1886), that "in Peete's case the tax was for every vessel arriving at a quarantine station, whether any service was rendered or not," as well as measured by the tonnage of the vessel. If the fees had been imposed only as compensation for services rendered in inspection, reasonably equivalent, it would not now be held that there was a tonnage tax within the meaning of the Constitution. See *Packet Co. v. Keokuk*, 95 U. S. 80 (1877); *Transportation Co. v. Wheeling*, 99 U. S. 273, 283 (1878); *Packet Co. v. St. Louis*, 100 U. S. 423, 429 (1879); *Morgan v. Louisiana*, 118 U. S. 455 (1886).

³ Compare U. S. Const., art. i., sect. 10, cl. 3.

⁴ See *Metropolitan Board of Health v. Heister*, 37 N. Y. 661, 672 (1868).

Even when declared by a municipal corporation, it seems, like the punishment of criminals by city courts, more a public act than a strictly municipal one. By the very necessity of the case, a judicial inquiry to determine the propriety of declaring the quarantine is impracticable. The inquiry usually has to be conducted under circumstances in which judicial evidence cannot be had, and hearsay is the only available information. To admit witnesses from the region suspected to be infected, or to conduct an examination of goods coming therefrom, would be to invite the very danger feared. In most cases action must be prompt, or it will be futile.

Turning now to the classification of quarantine laws in our constitutional law, we shall find these laws to belong both to the class of police regulations and the class of regulations of commerce. From the beginning there are few prominent cases in which the police power has been discussed, in which quarantine laws have not been treated as typical examples of its exercise. Just what is meant by the expression "police power" is not difficult to determine, although an exact definition is impossible at the present stage of development of constitutional law. The Supreme Court has said: "This power is, and must be from its very nature, incapable of any very exact definition or limitation."¹ The conception of police power, however, gradually becomes more definite. Certainly no one would now say with Chief Justice Taney, that the police powers of a State "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions,"² although a recent opinion of the Supreme Court uses the term "police powers" to signify "the reserve powers of the State."³ Perhaps the most satisfactory brief description is Judge Cooley's: "The police of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is

¹ The Slaughter-House Cases, 16 Wall. 36, 62 (1872).

² The License Cases, 5 How. 504, 583 (1847).

³ W. U. Telegraph Co. v. Pendleton, 122 U. S. 347, 359 (1886).

reasonably consistent with a like enjoyment of rights by others.”¹ Police laws may be described as laws which determine what limitations upon the conduct of each member of society shall be imposed for the protection of the rights of others. The expression “police power” has acquired a technical meaning in our constitutional law, and can hardly be said to embrace legislation upon Government institutions, public works, and like matters, — subjects which have been assigned to the police power by constitutional jurists,² and even by our Supreme Court.³ Such subjects have generally been assigned in our treatises and decisions upon constitutional law to the power of taxation. It is advantageous to adopt as definite a conception as Mr. Tiedeman’s: “The police power of the Government, as understood in the constitutional law of the United States, is simply the power of the Government to establish provisions for the enforcement of the common, as well as civil, law maxim, *sic utere tuo ut alienum non lædas*.”⁴ A few judicial descriptions of the police power follow: “The police power of the State comprehends all those general laws of internal regulation which are necessary to secure the peace, good order, health, and comfort of society.”⁵ “This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State.”⁶ By this power, “persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State.”

If the conception of the police power just advanced be the true one, it follows that the police power which belongs to undivided sovereignty has been distributed by the Constitution, a portion being granted to the United States, and a much greater portion being left to the States.⁷ Express grants of police power were the powers given to Congress to provide for the punishment of

¹ Cooley, Const. Lim. (5th ed.) 706.

² Tiedeman, Lim. of Police Power, 3, 4.

³ *Barbier v. Conolly*, 113 U. S. 27, 31 (1884); *New Orleans Gas. Co. v. Louisiana Gas Light Co.*, 115 U. S. 650, 661 (1885).

⁴ Lim. of Police Power, 4; preface, vii.

⁵ *Chancellor Bates in P., W. & B. R.R. Co. v. Bowers*, 4 Houst. 506, 536 (1873). To the same effect, *Lake View v. Rose Hill Cem. Co.*, 70 Ill. 190, 193.

⁶ *Redfield, C. J., in Thorpe v. R. & B. R. Co.*, 27 Vt. 140, 149, 150, — a leading case See also *Com. v. Alger*, 7 Cush. 53 (1851).

⁷ Compare Cooley, Const. Lim. (5th ed.) 724, *586.

counterfeiting the securities and current coin of the United States ; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations ; to make rules for the government and regulation of the land and naval forces, including the militia ; to exercise exclusive legislation in all cases whatsoever over the District of Columbia, the forts, dockyards, etc., of the United States.¹ Congress has also full and complete legislative power over the Territories, subject at least only to the limitations imposed upon the General Government by the Constitution. "All territory within the jurisdiction of the United States, not included in any State, must necessarily be governed by or under the authority of Congress."² Congress has the same ample power over the Indian tribes upon their reservations, even when the reservations are within a State.³ To the United States Government was also granted, by necessary implication, police power to the extent "necessary and proper for carrying into execution"⁴ all the powers vested in the General Government by the Constitution ; for example, power to enact police regulations to protect the mails, to prevent evasion of the revenue laws, for the protection of patents, or for the regulation of commerce. All the rest of the police power incident to sovereignty, subject only to the limitations of the United States and State Constitutions, is vested in the States.⁵ Therefore, an act of Congress making it a misdemeanor to sell for illuminating purposes oil made of petroleum, inflammable at a less temperature or fire-test than 110° Fahrenheit, "can only have effect where the legislative authority of Congress excludes territorially all State legislation ; as, for example, in the District of Columbia. Within State limits it can have no constitutional operation."⁶ Yet a similar law by a State is valid, even against a vendor who manufactured the oil in question under letters-patent granted by the United States.⁷ An act of Congress, not confined in its operation to foreign and interstate commerce, punishing the

¹ Const., art. i., sect. 8.

² *National Bank v. County of Yankton*, 101 U. S. 129, 133 (1879); *Murphy v. Ramsay*, 114 U. S. 15, 44 (1884).

³ *U. S. v. Kagama*, 118 U. S. 375 (1886).

⁴ Const. art. i., sect. 8, last clause.

⁵ U. S. Const., 10th amendment.

⁶ *U. S. v. Dewitt*, 9 Wall. 41, 45 (1869).

⁷ *Patterson v. Kentucky*, 97 U. S. 501 (1878).

counterfeiting of trade-marks, is unconstitutional on the same ground.¹

Preliminary to the question, what limitations are imposed by the Constitution upon State quarantine laws it is necessary to inquire whether any limitations are imposed by the Constitution upon the police power of the States. The delicacy and importance of this question can hardly be over-estimated. The decisions which afford an answer are comparatively recent; and while the tide of authority is now only one way, the question cannot perhaps be said to be finally settled. The dignity of the State Governments has been considered to be involved; and at one period of our national history, the proposition that the police power of a State is limited by the Constitution was contested with bitterness.

Beginning about the year 1820, South Carolina, and, later, other slave States, enacted laws providing that if any vessel should bring into the State "any free negroes or persons of color" employed on board, such persons should be seized and confined in jail until the vessel was ready to leave. The ship captain was then bound, under penalty of fine and imprisonment, to carry them away and pay the expenses of their imprisonment. The application of these laws to foreign vessels led to diplomatic troubles, the result of which was that the laws ceased in practice to be applied to any vessels except those coming from the Northern States. In a report of the Committee on Commerce of the House of Representatives² in January, 1843, upon a petition of ship-owners and other citizens of Massachusetts, the constitutionality of these laws was fully discussed. The majority of the committee, in a report presented by Mr. Winthrop, took the position that the laws were unconstitutional regulations of commerce, as well as in violation of the treaties of the United States, and of the clause in the Constitution³ which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Colored persons, said the committee, were citizens of Massachusetts nine years before the adoption of the Constitution. It was claimed that the laws in question could not properly be called police regulations. One of the closing resolutions offered by the committee was,

¹ Trade-mark Cases, 100 U. S. 82 (1879).

² 27th Congress, House Report No. 80 (Third Session).

³ Const., art. iv., sect. 2.

"That the police power of the States can justify no enactments or regulations which are in direct, positive, and permanent conflict with express provisions or fundamental principles of the national compact." Appended to this report was a decision rendered in 1813 by Mr. Justice Johnson of the Supreme Court, himself a native South Carolinian, holding the law unconstitutional under the clause granting to Congress power to regulate commerce with foreign nations and among the several States, and declaring with feeling that "on the constitutionality of the law under which this man is confined, it is not too much to say that it will not bear argument."

The minority report of the committee took the ground that the laws were necessary regulations of internal police, within the reserved power of the States; that Congress had never exercised its power to regulate commerce over this subject; and that colored persons were not "citizens" in the sense of the Constitution. Quarantine laws were repeatedly cited, both in the minority report and the opinion of Attorney-General Berrien, appended in its support, as undistinguishable from the laws in question. "Is this right of self-protection," said the latter, "limited to defence against physical pestilence?" The position of the minority derived strong support from the language of the court in the case of *City of New York v. Miln*.¹ Yet the proposition laid down in the resolution above quoted was neither in the minority report nor Mr. Berrien's opinion seriously and directly controverted, — strong testimony at that period of controversy to the strength of the position.

The question is, whether by the act of the people of a State in adopting the Constitution a practice of the internal-police powers of the State Government was taken away. Now, if it be conceded that a free colored person was a citizen in the meaning of the Constitution, it can hardly be doubted at this day that a State could not, without violating the clause in the Constitution quoted above, imprison him for entering her borders. In the leading case of *Gibbons v. Ogden*,² the court, speaking through Chief Justice Marshall, had declared that since the law of New York was in conflict with constitutional law of the United States, it was immaterial whether or not the State law was passed "in virtue of a power to regulate domestic trade and police." Yet in the period

¹ 11 Pet. 102, 138 (1837).

² 9 Wheat. 1, 210 (1824).

of slavery agitation which follows, opinions were not wanting "that all those powers which relate to merely municipal regulations, or what may more properly be called *internal police*, are not surrendered by the States, or restrained [by the Constitution of the United States]; and that consequently in relation to these the authority of a State is complete, unqualified, and exclusive."¹ The language quoted is from the opinion of the majority of the court in *City of New York v. Miln*,² where it is made the ground of the decision, and considered an "impregnable position." In that case a law of New York was held constitutional which required the masters of incoming vessels, under penalty of a fine, to report in writing to the mayor of New York the name, place of birth, and last settlement of all passengers for New York taken on board by him. Mr. Justice Story dissented, with the "entire concurrence upon the same grounds" of Chief Justice Marshall, who died after hearing the arguments, but before the final decision. The grounds of the dissenting opinion were that the power of Congress to regulate foreign and interstate commerce was exclusive, and that the States have no power to enact laws "which trench on the authority of Congress in its power to regulate commerce." It is said also, "A State cannot make a regulation of commerce to enforce its health laws, because it is a means withdrawn from its authority."³ The view of Marshall and Story that the commercial power of Congress is a limitation upon the police power of the States is now the established doctrine. This was the express ground of decision in the leading case of *Henderson v. Mayor of New York*,⁴ holding that a State cannot constitutionally impose burdens upon immigration into the United States. The court, speaking through Mr. Justice Miller, unanimously declare, "It is clear, from the nature of our complex form of government, that, whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States." This

¹ For example, the opinions of Mr. Justice Grier in the *License Cases*, 5 How. 504, 631 (1847); Mr. Justice McLean in the *Passenger Cases*, 7 How. 283, 400 (1849); and especially *City of New York v. Miln*.

² 11 Pet. 102, 139 (1837).

³ 11 Pet. 156. The same idea is expressed by McLean, J., in *Groves v. Slaughter*, 15 Pet. 449, 505 (1841).

⁴ 92 U. S. 259, 272 (1875).

rule has been repeatedly and emphatically laid down by the Supreme Court.¹ In the recent Iowa liquor-law case, *Bowman v. Chicago & N. W. Railway Co.*,² a law of Iowa forbade any common carrier to transport knowingly intoxicating liquors to any point within the State, unless first furnished with a certificate from the auditor of the county to which said liquors were to be transported, that the consignee was authorized to sell intoxicating liquors in that county. Foreign liquors, imported under the laws of the United States, were excepted from the operation of the law while in the original packages. The defendant was sued in the United States Circuit Court for refusing to transport liquors in the absence of such a certificate. The State law was held void as conflicting with the regulation by Congress of commerce among the several States. The majority of the court, speaking through Mr. Justice Matthews, considered the law to be a regulation of interstate commerce, operating directly upon commerce itself. The subject of the transportation of goods was one capable of a national plan or system of regulation, and one which Congress, by its action, had in effect declared should be free from restraint. It was conceded that a State, for the purpose of protecting its people against the evils of intemperance, has the right to prohibit within its limits the manufacture of intoxicating liquors as well as all domestic commerce in them. "It may adopt any measures tending, even indirectly and remotely, to make the policy effective, until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be."³

Chief Justice Waite and Justices Harlan and Gray dissented. The dissenting opinion by Justice Harlan takes the position that "the police power, as far as it involves the public health, the public morals, or the public safety, remains with the States, and is

¹ *Chy Lung v. Freeman*, 92 U. S. 275 (1875); *R. R. Co. v. Husen*, 95 U. S. 465, 471, 472 (1877); *New Orleans Gas Co. v. La. Light Co.*, 115 U. S. 650, 661 (1885); *Morgan v. Louisiana*, 118 U. S. 455, 464 (1886); *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 359 (1886); *Bowman v. Chicago & N. W. Ry. Co.*, 8 Sup. Ct. Rep. 689 (March 19, 1888), 125 U. S. 465.

² 8 Sup. Ct. Rep. 689; s. c. 125 U. S. 465.

³ 8 Sup. Ct. Rep. 702, 703; 125 U. S. 493.

not overridden by the national Constitution.”¹ It is even said that since “the States have not surrendered, but have reserved the power, to protect, by police regulations, the health, morals, and safety of their people, Congress may not prescribe any rule to govern commerce among the States which prevents the proper and reasonable exercise of this reserved power.”² It is maintained that the power of Congress to regulate interstate commerce had not been exercised over this subject; that nothing short of a positive enactment of Congress ought to be construed as taking away a part of the police power of the States. While there may be room for doubt whether the inaction of Congress was rightly construed by the court, one can hardly subscribe to the language above quoted, which seems to lead to the conclusion that the powers granted to Congress by the Constitution, by its own terms, “the supreme law of the land,” are controlled by the police powers of the States, where the public health, morals, or safety are involved. This seems to be an inversion of the true view, which regards each of the powers granted to the General Government as supreme in its peculiar sphere, and in so far controlling the reserved powers of the States. To find the limitations on the powers of Congress, we are to look, not to the legislation of the States, but to the Constitution.

The limitations upon the police power, that a State cannot in its exercise enter the domain of legislation which, under the Constitution, exclusively belongs to Congress, or violate the prohibitions of the Constitution upon the States, operates upon the other reserved powers of the States as well. For instance, a State cannot, in the exercise of its power of taxation, regulate foreign or interstate commerce.³ As was said in *Robbins v. Shelby Taxing District*⁴ (the “Drummer Tax Case”); “Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State.” Indeed, the cases just cited seem to lay down a rule that a State cannot for any purpose pass a law which oper-

¹ 8 Sup. Ct. Rep. 712; 125 U. S. 519.

² 8 Sup. Ct. Rep. 712; 125 U. S. 520.

³ *Case of State Freight Tax*, 15 Wall. 282 (1872); *Robbins v. Shelby Taxing District*, 120 U. S. 489, 497 (1887); *Phila. Steamship Co. v. Pennsylvania*, 122 U. S. 326 (1887). See also *Brown v. Houston*, 114 U. S. 622, 630 (1884).

⁴ 120 U. S. 489, 497 (1887).

ates, to the extent of regulation, directly and immediately upon foreign or interstate *commerce itself*.¹ If this rule is to be taken as established, there are certainly two exceptions. Inspection laws, saved by the Constitution itself,² and quarantine laws are historical exceptions, old as the Constitution itself, and recognized throughout the whole series of decisions construing it. The question left open by the Supreme Court in *Henderson v. Mayor of New York*,³ whether a State has power to exclude actual pauper immigrants or convicted criminals, must be considered doubtful, since the case of *Bowman v. Chicago & N. W. R'y Co.*⁴ A law excluding such persons would differ from a quarantine law by not being local and temporary in its operations; so that the inaction of Congress might be construed in the one case as a regulation that no restraints shall be imposed, and not in the other.

We shall now consider the limitations imposed by the Constitution upon the police power of the States, which are applicable to quarantine laws. One limitation has already been considered, namely, that a State cannot impose a tonnage duty to defray quarantine expenses.⁴ By far the most important limitation with which we have to deal is the power of Congress "to regulate commerce with foreign nations, and among the several States." Quarantine laws are, from their very nature, regulations of foreign and interstate commerce. It is practically impossible that the operation of such laws should be confined to domestic commerce, whose entire transit is within the State.⁵ In the language of Chief Justice Marshall, constantly reiterated by the Supreme Court, "Commerce undoubtedly is traffic, but it is something more,—it is intercourse."⁶ The case cited holds that commerce includes navigation. It has long been settled that persons as well as property are subjects of commerce in the sense of the Constitution.⁷ Quarantine laws operate directly upon commerce itself, imposing re-

¹ It does not follow that all State legislation which indirectly regulates such commerce is forbidden; for example, laws to prevent confusion among vessels, and to facilitate the discharge of passengers and freight. See *Gloucester Ferry Co. v. Penn.*, 114 U. S. 190, 206 (1884). Pilotage laws and port regulations seem to belong to this same class.

² Const., art. i., sect. 10, cl. 2.

³ *Supra*.

⁴ Const., art. i., sect. 10, cl. 3. See *supra*, p. 269.

⁵ Compare *Wabash Ry. Co. v. Ill.*, 118 U. S. 558 (1886).

⁶ *Gibbons v. Ogden*, 9 Wheat. 1, 189 (1824).

⁷ *Gibbons v. Ogden*, *supra*, p. 215; *Passenger Cases*, 7 How. 283 (1849).

straints amounting even to a temporary prohibition of intercourse. So far as they do not regulate commerce, they are worthless for the protection of health. It is hard to conceive rules exercising more direct control over commerce. "Transportation is essential to commerce, or, rather, it is commerce itself; and every obstacle to it or burden laid upon it by legislative authority is regulation."¹

In discussing regulations of commerce, there is great danger of being misled by terms, for different judges have not used the words in the same sense. Upon the meaning of the phrase "to regulate commerce" in the Constitution, the decisions have indeed substantially agreed. The words are not used in a technical sense. "To regulate," said Chief Justice Marshall in *Gibbons v. Ogden* is "to prescribe the rules by which commerce is to be governed."² "That is," adds Mr. Justice Field, "the condition upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited."³ To *exercise control* over commerce seems to be what is meant. The idea to be contrasted with regulating is affecting or influencing commerce. Commerce is so sensitive a thing that scarcely a law can be passed that does not more or less remotely affect it. Laws not otherwise unconstitutional, which operate on foreign or interstate commerce only indirectly, secondarily, and remotely, have never been treated by the courts as forbidden to the States.⁴ To this class belong most, but not all, State police regulations. "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it

¹ *R. R. Co. v. Husen*, 95 U. S. 465, 470, citing other cases.

² 9 Wheat. 1, 196 (1824).

³ *Welton v. State of Missouri*, 91 U. S. 275, 279 (1875).

⁴ The cases establishing this distinction are numerous and uncontroverted. Many are collected in Mr. Pomeroy's article upon The Power of Congress to Regulate Interstate Commerce, 4 South Law Rev. 357, 390, *et seq.*; also in *Phila. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 346 (1886). A recent case is *Smith v. State of Alabama*, 8 Sup. Ct. Rep. 564, 124 U. S. 465 (1888). The doctrine is carefully and elaborately stated in *Robbins v. Shelby Taxing District*, 120 U. S. 489, 493 (1886).

within the meaning of the Constitution.”¹ Whether a certain law regulates or only affects commerce is sometimes as difficult to determine as whether a given cause of damage was proximate or remote; yet the distinction is legally as real and necessary in the one case as the other. No sharp dividing line can be drawn where the gradations are so indefinite.

When, however, we come to consider the use of the words “regulation of commerce” as applied to State legislation, we find different meanings, due to past conflicting theories of constitutional rights. Until the question was settled whether the power of Congress to regulate foreign and interstate commerce was exclusive, or whether a like concurrent power belonged to the States, the advocates of the doctrine of absolute exclusiveness were compelled to maintain that all regulations of such commerce by the States were unconstitutional. When, therefore, they said a State law was a regulation of foreign or interstate commerce, they implied that the law was not constitutional. Now, certain State police regulations obstructing commerce—such as quarantine laws—were conceded by all to be constitutional. It had, therefore, to be assumed by those judges who maintained the theory of exclusiveness that a police regulation could not be a regulation of commerce,—a proposition which, as we have seen, was found serviceable in sustaining the laws of the slave States excluding free negroes. The result was a use of the term “regulation of commerce” which led to no little confusion. The first case in which the clause granting to Congress power to regulate commerce was construed was *Gibbons v. Ogden*.² There the court held that a law of New York granting for a term of years to Robert Fulton and another the exclusive right of navigating with boats moved by fire or steam all waters within the jurisdiction of the State, was unconstitutional, so far as the law applied to vessels licensed under the laws of the United States to carry on coasting-trade. Illustrations of the use of the words “regulation of commerce” in a sense excluding police regulations, will be found in the arguments of Mr. Webster³ and Mr. Wirt,⁴ as well as the opinion of Chief Justice Marshall⁵ and Mr. Justice Johnson.⁶ Mr. Oakley’s argument, however, intimates that police regulations may be also regulations of com-

¹ *Sherlock v. Alling*, 93 U. S. 99, 103 (1876).

² 9 Wheat. 1 (1824).

³ 9 Wheat. 18.

⁴ *Id.* p. 178.

⁵ *Id.* p. 203.

⁶ *Id.* p. 235.

merce.¹ Mr. Justice Story seems to have considered police regulations and regulations of commerce as mutually exclusive terms,² and such was clearly the view of Mr. Justice Baldwin in *Groves v. Slaughter*.³ On the contrary, Chief Justice Taney, for example, declared that "all of these health and quarantine laws are necessarily, in some degree, regulations of foreign commerce in the ports and harbors of the State."⁴ After the question how far the power of Congress to regulate commerce is exclusive was in a degree settled by the case of *Cooley v. Port Wardens*,⁵ the term "regulation of commerce" ceased to be used in a sense implying either unconstitutionality or the exclusion of police regulations. In the later decisions of the Supreme Court the words are used in the same sense in which Chief Justice Taney used them. For instance, a State quarantine law is now considered to be a regulation of commerce,⁶ although a police regulation; while a large class is now recognized of regulations of foreign and interstate commerce which may be constitutionally enacted by the States. To-day, in order to be declared unconstitutional under the commercial clause of the Constitution, a State law must be not only a regulation of foreign or interstate commerce, but one in conflict with the power of regulation as actually exercised by Congress.

The view is put forward in a recent number of the *HARVARD LAW REVIEW*,⁷ in an article by Mr. Greely, that the test whether a State law is a regulation of foreign or interstate commerce is the object of the Legislature in passing the law. If intended for police purposes, Mr. Greely contends that the law is not a regulation of commerce. Of this view it is to be said that the authorities are decidedly against it. Beyond the *dicta* of Justice Johnson in *Gibbons v. Ogden*,⁸ and Woodbury in the *License Cases*⁹ and *Passenger Cases*,¹⁰ and the opinion of the court in *City of New York v. Miln*,¹¹ the force of which is weakened by the powerful dissent of Marshall and Story, the present writer has failed to find

¹ 9 Wheat. 72.

² Story on Const., § 1090, 4th ed.

⁴ *License Cases*, 5 How. 504, 581, 582 (1847).

⁶ *Morgan v. Louisiana*, 118 U. S. 455, 463, 465 (1886).

⁷ Harv. L. Rev. 159.

⁸ 9 Wheat. 1, 235 (1824).

⁹ 5 How. 504, 626 (1847).

¹⁰ 7 How. 283, 552, 553 (1849).

¹¹ 11 Pet. 102, 137 (1837).

³ 15 Pet. 449, 511 (1841).

⁵ 12 How. 299 (1851).

any authority in favor of this view. The decisions of *Gibbons v. Ogden* and *Willson v. The Black Bird Creek Marsh Co.*¹ do not fairly support such a doctrine. The other cases cited in its support are explainable as cases of either only colorable police regulations, or of regulations of commerce by the States, permissible in the absence of congressional regulations. Recent decisions expressly reject the proposed test. In *Henderson v. Mayor of New York*, the court declare that "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."² This language is quoted and applied by the court in *Railroad Co. v. Husen*,³ holding unconstitutional a statute clearly intended by the Legislature to be a health law. To the same effect is *Morgan v. Louisiana*,⁴ citing other cases. The court has not hesitated to go into the mode of the actual administration of the law to determine the constitutionality of the rule enforced in a particular case.⁵ Furthermore, the test suggested does not seem to be a very helpful one. How is the object of the Legislature in passing a law to be determined? To answer this question one is compelled to examine the effect and operation of the law. Mr. Greely himself is driven to resort to this method in order to save the rule he proposes from the effect of recent decisions.⁶ It is no great advance to say that we are to look at the object, not the operation, of the law to decide whether it is a regulation of commerce, and then resort to the operation of the law to determine what was its object. It is simpler and more consistent with the authorities to ask directly, Does the law *operate* as a regulation of commerce?

Blewett H. Lee.

LEIPZIG.

[To be continued.]

¹ 2 Pet. 245 (1877).

² 92 U. S. 259, 268 (1875).

³ 95 U. S. 465, 472 (1877).

⁴ 118 U. S. 455, 462 (1886).

⁵ *Yick Wo v. Hopkins*, 118 U. S. 256, 373 (1886).

⁶ 1 Harv. L. Rev. 179.

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AN interesting article by Professor Gray on "Cases and Treatises," in the September-October number of the "American Law Review,"¹ written partly in answer to Mr. Bishop's address on "The Common Law as a System of Reasoning," recently published in that magazine, discusses, among other things, the comparative value of adjudged cases and text-books as instruments of legal education, and corrects several misunderstandings as to the method of instruction in the Harvard Law School.

After premising that the "case system" requires a certain amount of intelligence in teacher and student, and a certain amount of time for its satisfactory employment, — probably two years, at least, — Mr. Gray continues: —

"Most of the criticism that has been raised by the study of cases in the Harvard Law School has been really aimed at the subjects which have been selected for study," with "this unfortunate result, that the method has shared in a disapproval, whose only real object was the choice of subjects for the application of the method.

"One other misunderstanding has arisen from a mere verbal similarity. 'I do not believe in case lawyers,' it has been said to me more than once, as if that were a knock-down argument against the method of study by cases. By a 'case lawyer,' I suppose, is generally meant a lawyer who has a great memory for the particular circumstances of cases, but who is unable to extract the underlying principles. But the 'case system' has no tendency to produce lawyers of that type. It makes no effort and offers no inducement for the student to charge his memory with the names or the facts of particular cases. It uses the case merely as material from which the student may learn to extract the underlying principles.

"I have used the expression 'case system,' but I do not like it, for it suggests a hide-bound and stereotyped mode of instruction. Nothing can be further from the truth. No scheme of teaching affords a greater scope for individuality. To Professor Langdell belongs the credit of introducing the method at Cambridge; but the styles of teaching of the different professors are as unlike as possible. We agree only in making cases, not text-books, the basis of instruction. . . .

"And I am far from thinking that the method of case study as practised at Cambridge is the final word on legal education. The improvement in the art of education in the last quarter of a century has been great. I do not believe that improvement has come to an end.

All that I contend is, that the method of study by cases is the best form of legal education that has yet been discovered.

"It is the best, because it is most in accordance with the constitution of the human mind; because the only way to learn how to do a thing is to do it. No man ever learned to dance or to swim by reading treatises upon saltation or natation. No man ever learned chemistry except by retort and crucible. No man ever learned mathematics without paper and pencil. . . .

"Although an important object of education is to tell the student what others have found out, a more important object is to teach him to find things for himself.

"The greatest teacher the world has ever known was fond of comparing himself to a midwife. His task, he said, was to aid the scholar to bring forth his own ideas. He, to-day, will be the most successful teacher who can best exercise this obstetrical function. And in law no better way has been devised to make the student work for himself than to give him a series of cases on a topic and compel him to discover the principles which they have settled and the process by which they have been evolved. A young man thus trained not only learns the common law, but is imbued with its historical and progressive spirit. . . .

"In the matter of exciting interest and fixing in the memory, the advantage is all on the side of the study of cases. To keep the attention fastened and every power of the mind awake when reading continuously a book so severely abstract as a treatise on law, is a very difficult task. To retain the contents in the memory is still more difficult. . . . The case gives form and substance to legal doctrine, it arrests the attention, it calls forth the reasoning powers, it implants in the memory the principles involved. . . .

"When from a case the student has gained a vivid sense of what the difficulties of a subject are, he will be eager to turn—and he will turn with profit—to find out what able and learned jurists have said on them, and to classify and systematize his knowledge. Their words will fall on a prepared soil, and will stay in his memory. But to begin with text-books is to begin at the wrong end."

A RECENT decision by Judge Jackson, of the United States Circuit Court, at Louisville, Ky.,¹ has an important bearing on the powers of the Interstate Commerce Commission. A controversy between the Kentucky & Indiana Bridge Company and the Louisville & Nashville Railroad had been brought before the Commission, who decided in favor of the Bridge Company. The railroad refused to obey the orders of the Commission, and the Bridge Company applied to the court to enforce the order. After a hearing, the court refused to follow the recommendation of the Commission, or to enforce their order against the Railroad Company. The court, in so deciding, held that, the Commission being given no power to enforce their decrees and being obliged to apply to the United States Circuit Courts for that purpose, their decisions have no final or binding authority; they are only in the nature of reports of a referee, which leave all questions of law and fact open for the consideration of the Circuit Court as original questions, except in so far as the findings are *prima facie* evidence of what is therein contained.

The Interstate Commerce Act provides, in substance, that the Com-

¹ The Chicago Times, Jan. 8, 1889. [37 Fed. Rep. 567.]

mission shall have power to investigate cases arising under the act; that its findings shall be *prima facie* evidence in any subsequent judicial proceedings; that its recommendations may be enforced by petition, in a summary way, to the Circuit Courts of the United States; and that "if it be made to appear to such court . . . that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same." It will be seen that no specific provision is made for the case where the Circuit Court finds itself obliged to differ from the Commission, either as to matter of fact, or as to matter of law; and hence arises the importance of this decision. An appeal has been allowed to the Supreme Court of the United States.

THE first prize offered last winter by the Medico-Legal Society of New York for the best essay on a medico-legal subject, has been awarded to one of the original editors of this REVIEW, Mr. J. H. Wigmore, L.S. '87, the subject of whose article was "Circumstantial Evidence in Poisoning Cases." Among the members of the awarding committee were ex-Judge Dillon and ex-Judge Noah Davis.

The article, which was printed in full in the "New York Mail and Express," Dec. 17, 1888, is an analysis, based upon a historical review of adjudged cases of the amount and kind of evidence necessary to sustain an indictment for murder by poisoning. These propositions must be established to sustain such an indictment:—

First, it must be proved that the deceased died by poison. This may be shown by one of two kinds of circumstantial evidence; either (*a*) by an analysis of portions of the body or of substance known to have entered the body, or (*b*) by the observed symptoms and appearances before and after death.

Second, it must be proved that the poison was administered by the accused or by his agency. Direct evidence of this fact being rarely obtainable, circumstantial evidence must generally be relied upon. This circumstantial evidence consists of a group of four subsidiary facts, from which the existence of the principal fact—the defendant's guilt—is to be inferred: (*a*) previous possession of the poisonous substance; (*b*) opportunity of administration; (*c*) antecedent possibility or probability, including motive and expressed intention; and (*d*) impossibility or improbability of administration by other agencies.

Third, it must be shown that the accused administered the poison with knowledge of its probable effects.

The outlines of this summary are filled out in Mr. Wigmore's article by an interesting and instructive discussion of the varying importance to be attached to each of these different items of evidence, the probative force of each, and the roles played by each in the various adjudged cases of the past.

"THE good old English law," as Charles Kingsley somewhere calls it, that every Englishman has a right to attend church, for it is God's house, has lately received judicial recognition.

A reformatory boy being prevented by the church-warden from entering the church, and having brought action for the assault, it was

held that he had a right to attend service, and that the assault was without justification (*Taylor v. Timson*, 20 Q. B. D. 671).

This right, Stephen, J., traces to the statutes of 5 and 6 Edw. VI., which enacted that "all and every person and persons inhabiting within this realm . . . shall diligently and faithfully . . . endeavor themselves to resort to their parish church." Repealed under Mary, reënacted under Elizabeth, and modified in various ways by the Toleration Act and by Victorian legislation, these statutes are still a part of the English law to this extent, that "any person, be he whom he may, who is not a dissenter from the Church of England, is liable to ecclesiastical censure if he does not go to church;" and this would really operate as a fine, for the person censured would have to pay the costs.

It was suggested that there were over eleven hundred people in the district chapelry, exclusive of the boys in the reformatory, and that the church would accommodate only about three hundred. To this argument drawn from overcrowding, the learned justice rather slyly remarks: "The Church of England has got on very well for a long time without deciding that question, and will probably get on very well in the future."

One of the early cases cited showed that formerly a private seat in a church was regarded as a nuisance, and that, when no prescriptive right existed, any one might carry the seat away; for "it is not reasonable that one should have his seat and that two shall stand, for no place belongs more to one than another."

MINISTER PHELPS, in an address delivered before the Glasgow Juridical Society, Nov. 15, 1888, is reported to have made the following remarks on lawyers as speech-makers:¹—

"Time was when the lawyers were esteemed to be preëminently the speech-makers. But they have been in latter days so far surpassed in that accomplishment by other classes in society, that they are no longer entitled to this questionable distinction. Lawyers are not much addicted to gratuitous oratory. They are seldom heard from until they are retained; nor then, unless there is an issue formed which it is necessary to discuss. Their arguments must be confined to the matter in hand, and must cease when the discussion is exhausted or the question determined. They do not enjoy the latitude allowed to the lawyer described by the Roman satirist, whose client was heard complaining 'that his lawsuit concerned three little kids, while his advocate, in large disdain of these, was thundering in the Forum over the perjuries of Hannibal and the slaughter of Cannæ.' The limits of forensic discourse are grave impediments to the cultivation of eloquence, which, in its modern state, needs to be unembarrassed by facts, unrestrained by occasion, and unlimited by time. So the bar has fallen into what might be called, in comparison with discussions elsewhere, a measurable silence."

MISPRINTS.—The following errors occurred in our November number: The omission of the word "that" between the words "policy" and "cannot," line 10, p. 184; the use of word "cannot" instead of "can" in line 6 of the case on Common Carriers, p. 187; and the citing of the case on Imputed Negligence of *Bisaillon v. Blood*, p. 190, as in 13 Atl. Rep., instead of 15 Atl. Rep.

¹ 38 Alb. L. J. 466.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

BILLS AND NOTES — LIABILITY OF INDORSER OF NON-NEGOTIABLE NOTE. — The defendant signed his name on the back of a non-negotiable note before delivery to the payee. The question arose whether he was affected by a stipulation in the note whereby indorsers waived presentation, protest, and notice. *Held*, that he was not affected, because his liability was not that of an indorser, but of a surety or joint promisor, who is liable without notice of default by his principal. *Pool v. Anderson*, 18 N. E. Rep. 445 (Ind.).

In Indiana such a signature on the back of a negotiable note would make the signer liable, presumptively, as an indorser. The court, in this case, refused to apply the same rule to a non-negotiable note, because one cannot be an indorser, in a commercial sense, of non-negotiable paper. The question naturally arises, why does the nature of the contract depend upon negotiability? It would seem that the intention, in either case, is merely to become a surety. The courts are in inextricable confusion as to the liability of the "anomalous indorser," as he has been called. See 1 Ames, Bills and Notes, 269, *note*, for a full collection of cases.

COMMON CARRIERS — CONNECTING LINES — INJURIES TO PASSENGERS. — Defendant issued round-trip excursion tickets to a point on a connecting line. The train was, by contract between defendant and the connecting line, taken over the connecting line by the latter's engine and in charge of its employees. *Held*, that employees were *pro hac vice* defendant's employees, and that defendant was answerable in an action founded on their negligence on the connecting line. *Washington v. Raleigh & G. R. Co.*, 7 S. E. Rep. 789 (N. C.).

The doctrine of this case has been denied in *Sprague v. Smith*, 29 Vt. 421. See also *Straiton v. N. Y. & N. H. R.R.*, 2 E. D. Smith, 184.

In accord with the principal case see *Great Western Ry. v. Blake*, 7 H. & N. 987; *Buxton v. North Eastern Ry.*, L. R. 3 Q. B. 549; *Thomas v. Rhymney Ry.*, L. R. 6 Q. B. 266.

In Massachusetts the question seems to be an open one. See *Schopman v. B. & W. R.R.*, 9 Cush. 24, 29.

COMMON CARRIERS — GOODS DELAYED BY STRIKE. — A railroad company is not liable for damage caused by delayed freight, where the cause of the delay is an organized strike, which neither the railroad company nor the civil authorities can control. *Haas v. Kansas City, F. S. & G. R. Co.*, 7 S. E. Rep. 629 (Ga.).

CONSTITUTIONAL LAW — CHINESE EXCLUSION ACT OF 1888. — The petitioner, a Chinese laborer, had in his possession a return certificate issued by the United States government. At the time that the Chinese exclusion act became a law — Oct. 1, 1888 — he was on the high seas *en route* for California; and, on his arrival at San Francisco, was denied admittance to the United States. It was urged that the act was unconstitutional as depriving petitioner of a vested right, and as being an *ex post facto* law. *Held*, that the act applied to petitioner; that the return certificate was not a contract giving a vested right, but simply evidence to identify a person entitled to privileges provided for in our treaties with China; and that the act was not an *ex post facto* law, because a Chinaman's departure from the country is not made, and is not in the nature of, an offence. *In re Chae Chau Ping*, 36 Fed. Rep. 431 (Cal.).

CONSTITUTIONAL LAW — EMINENT DOMAIN — TAKING PROPERTY WITHOUT COMPENSATION. — The act of Congress of Aug. 1, 1888, authorizes designated government officers to acquire for the United States, by condemnation, real estate for the erection of public buildings, and confers upon the United States Circuit and District Courts jurisdiction of the condemnation proceedings, but does not provide for compensation to the owner. *Held*, that the act is not in conflict with the clause of the Constitution of the United States declaring that private property

shall not be taken for public use without just compensation, as the act must be read with the Constitution, and it must be assumed the courts will not award process of condemnation unless compensation be provided for. *In re Rugheimer*, 36 Fed. Rep. 369 (S. C.).

CONSTITUTIONAL LAW — EX POST FACTO LAWS — ACT VOID IN PART. — The rule laid down in Cooley's Const. Lim. (5th ed.) 215, that "a general law for the punishment of offences, which should endeavor to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control," is cited as the *ratio decidendi* in *Jaehne v. People of New York*, 9 Sup. Ct. Rep. 70; s. c. 16 Wash. L. Rep. 763.

CONSTITUTIONAL LAW — LEGISLATIVE ACT DEPRIVING MUNICIPALITIES OF POLICE POWER. — An act of the Massachusetts Legislature, providing that the police of the city of Boston shall be put under the control and management of a board of police appointed by the Governor of the State, is a constitutional exercise of legislative power. Under the State Constitution giving the Legislature power to establish a municipal government in any city or town, to grant privileges and immunities to its citizens, and to pass all laws the Legislature judges to be for the "good and welfare" of the Commonwealth, "the powers and duties of all the towns and cities, except so far as they are specifically provided for in the Constitution, are created and defined by the Legislature," and subject to its control. The act in question violates no provision of the Constitution, and the court "cannot declare an act of the Legislature invalid because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by any provision in the Constitution." *Com. v. Plaisted*, Mass. Sup. Ct. Rescript of Jan. 6, 1889.¹

See Cooley's note on "Local Self-Government," 1 Story on the Constitution, 4th ed. § 280, the general tendency of which is in conflict with the doctrine of *Com. v. Plaisted*. So long, it is said, as municipal corporations for local self-government exist, "though the State may lay down rules for the regulation of their affairs and the management of their property, it is nevertheless a part of the right of self-government that the people concerned should choose their own officers who are to administer such rules and have the care of such property, and the State cannot appoint such officers, as it might those who are to perform duties of a more general nature for the public at large." *Ibid.*, p. 197, and cases cited.

CONSTITUTIONAL LAW — PATENTS — SUIT BY GOVERNMENT TO SET ASIDE FOR FRAUD. — A suit will lie by the United States government in the United States Circuit Courts to set aside a patent for an invention, on the ground that it has been obtained by fraud. The analogous cases establishing that the United States government has the right to bring suit in its own courts to set aside land patents issued by the government, obtained by the fraud of the patentee, rest either upon the ground that the government has a direct pecuniary interest in the result, or that it is under an obligation to bring the suit, either to an individual who will be thereby benefited, or to the public. "The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud." *United States v. Bell Telephone Co.*, 9 Sup. Ct. Rep. 90; s. c. 38 Alb. L. J. 473.

CONSTITUTIONAL LAW — RIGHT TO JURY TRIAL. — A statute which extends the jurisdiction of a court of equity to quiet titles to cases where the lands are unoccupied is not unconstitutional as depriving the defendant of the right to trial by jury secured by the Constitution, for such constitutional provision extends only to cases where the common-law trial by jury was customary, and at common law ejectment did not lie where defendant was not in possession. *Grand Rapids & I. R. Co. v. Sparrow*, 36 Fed. Rep. 210 (Mich.).

CONSTITUTIONAL LAW — STATUTE IMPAIRING OBLIGATION OF CONTRACTS. — A statute of the United States gave the United States the right to sue in tort for the cutting of certain timber on public lands. Under this statute a cause of action accrued against defendant, but no suit was brought until after the statute was repealed. *Held (semble)*, that the repeal of the statute did not take away this right to sue defendant in tort, for defendant's obligation might be

¹ [19 N. E. Rep. 224.]

regarded as contractual, since the tort could be waived and assumpsit brought, and the Constitution forbids the passage of any law impairing the obligation of contracts. *United States v. Williams*, 19 Pac. Rep. 288 (Mont.).

CONTRACT — ACCEPTANCE OF OFFER BY TELEGRAM. — A contract made by telegraph is completed when a telegram accepting an offer is despatched. *Cowan v. O'Connor*, 20 Q. B. D. 640 (Eng.).

This case is, in effect, one more authority added to the list in support of the proposition that a contract is complete on the mailing of the letter accepting an offer. *Household Ins. Co. v. Grant*, 4 Ex. D. 216. See 1 HARV. LAW REV. 146, for a moot-court decision by Prof. Frederick Pollock in support of this view. The theoretical objections to this view are clearly stated in Langdell's Sum. of the Law of Contracts, §§ 6-16, with a full discussion of the authority *pro* and *con*.

CONTRACT — CONSIDERATION — PART PAYMENT OF DEBT. — The doctrine of *Foakes v. Beer*, 9 App. Cas. 605, that the payment by a debtor of part of a debt actually due is not a good consideration for a contract not to take proceedings for the recovery of the residue, is not applicable to a case where a solicitor gave his personal check for part of the sum due from his client to another; because here there is something which can be a "new and different benefit to the person entitled to the larger sum of money," and there is, therefore, sufficient consideration for an accord and satisfaction. *Bidler v. Bridges*, L. R. 37 Ch. D. 406.

The case is criticised in 4 Law Quart. 368, as frittering away the rule laid down in *Foakes v. Beer*.

CONTRACT FOR THE SALE OF LAND — DEVISE OF THE LAND TO VENDEE — SPECIFIC PERFORMANCE. — Defendant contracted to buy land of plaintiff's testator, but before conveyance or payment of the purchase-money, the testator died, devising the land to defendant and another equally. *Held*, that the devise having been assented to by defendant, superseded, and so relieved defendant from all liability under, the contract. *Taylor v. Hargrove*, 7 S. E. Rep. 647 (N. C.).

CONTRACT — SPECIFIC PERFORMANCE. — The vendee of land, which was situated in another State, agreed to give his note for the purchase-price and to secure it by mortgage on the land. After conveyance of the land he refused to give the note and mortgage. *Held*, that vendee's promise may be enforced in equity, on the ground that the remedy at law is inadequate. — *Hicks v. Turck*, 40 N. W. Rep. 339 (Mich.).

DEEDS — QUITCLAIM DEED IN CHAIN OF TITLE — BONA FIDE PURCHASER. — A guarantee in a warranty deed, whose grantor has a warranty deed, and who acts in good faith and without actual notice, is entitled to protection as a *bona fide* purchaser, notwithstanding the existence of a quitclaim deed in the chain of title. *Sherwood v. Moelle*, 36 Fed. Rep. 478 (Neb.).

EVIDENCE — WRITINGS — CONDITION PRECEDENT PROVED BY PAROL. — In an action on a written agreement to raft logs, it was *held* not permissible to show by oral evidence that the logs were not to be rafted until the plaintiff furnished the necessary rafting gear. *Meekins v. Newberry*, 7 S. E. Rep. 655 (N. C.).

It is generally held permissible to prove by oral evidence a separate oral agreement constituting a condition precedent to any liability under a written contract. See Steph. Dig. Ev. § 90 (3), and cases cited.

FRAUDULENT CONVEYANCES — INSURANCE POLICIES — RIGHTS OF CREDITORS AGAINST BENEFICIARIES. — Insurance taken out by a husband upon his own life for the benefit of his wife and children, in jurisdictions where the proceeds may enure to her or their separate use, cannot be recovered by such creditors, although the husband was insolvent when the policies were issued, and the premiums were paid out of his own money, since such insurance is taken upon the interest of the wife and children in the husband's life. Nor can creditors recover out of the proceeds of such policy the amount of the premiums so paid, unless there is proof of actual fraud on the part of the wife or the insurance company, or the provision for the family is excessive. *Cent. Nat. Bank v. Hume*, 9 Sup. Ct. Rep. 41; s. c. 16 Wash. L. Rep. 777.

This, say the court, is not like the case where a husband, having insured his own life for benefit of himself, his executors, etc., subsequently assigns this policy to his wife and children, such assignment by an insolvent husband being in fraud of creditors. The husband here does not insure his own interest in his life, but takes out the policy on the insurable interest which his wife and children have in his life; he virtually gives his wife and children the annual

premiums that they may insure their interest in his life; such gift of annual premiums to his wife and children, not materially reducing the creditors' chance of recovering their debts, is not in fraud of creditors, unless there be actual fraud or an unreasonable provision. An insolvent husband has a right to make reasonable expenditures for the support of his wife and children while he is living; by analogy he has a right to make a reasonable outlay to secure their maintenance after his death.

HIGHWAYS — DEDICATION. — A grantor of land described the premises in his deed to defendant as bounded on certain streets. There were no streets at the place designated, but only unenclosed strips of land belonging to the grantor, which the public used as streets for more than five years subsequent to the grant. *Held*, a complete dedication and acceptance of the streets. *City of Eureka v. Croghan*, 19 Pac. Rep. 485 (Cal.).

HIGHWAYS — RIGHT OF ABUTTERS TO LIGHT AND AIR — USE OF STREET BY RAILROAD. — *Held*, that appropriating a public street to the construction and operation of an ordinary commercial railroad upon it, is not a proper street use; that it is an interference with a lot-owner's easement to light and air, which amounts to a taking of his property within the meaning of the Constitution; and that the lot-owner may recover whatever damages are thus caused to his lot. *Adams v. Chicago, B. & N. R. Co.*, 39 N. W. Rep. 629 (Minn.).

INSURANCE, FIRE — CONDITIONS AGAINST INCENDIARISM — Plaintiff insured his premises in the defendant company, a condition in the policy providing that it should not cover any loss "occasioned by or in consequence of incendiarism." The owner of the adjoining premises feloniously set fire to his house, and the fire spreading burned the plaintiff's premises. *Held*, that the plaintiff could not recover on the policy. "The word 'incendiarism,' as used in the condition in question, . . . includes any act of incendiarism wherever committed, which directly causes the loss or damage sued for." *Walker v. London & Prov. F. Ins. Co.*, Irish Exch. Div., Nov. 7, 1888; reported in 38 Alb. L. J. 471.

LARCENY — OBTAINING POSSESSION BY FALSE PRETENCE. — Defendant ordered an overcoat and pantaloons of a tailor. Afterwards, in the absence of the tailor, at the request of defendant, an employee gave the garments to defendant and accompanied him to his room to receive the pay for them. At the foot of a flight of stairs defendant asked the employee to wait for him while he went up to get his key, and disappeared, but did not return. *Held*, that he was guilty of larceny. *State v. Hall*, 36 Fed. Rep. 107 (Iowa).

MALPRACTICE — CLAIRVOYANTS. — In an action against a clairvoyant physician for malpractice, the court was asked to charge, that if at the time defendant was called to treat the plaintiff, both parties understood that he would treat him according to the approved practice of clairvoyant physicians, and that he did so treat him with the ordinary skill and knowledge of the clairvoyant system, plaintiff could not recover. *Held*, that the request to charge was properly refused. Instead of the words "with the ordinary skill and knowledge of the clairvoyant system," the instructions should have read, "with the ordinary skill and knowledge of physicians in good standing practising in that vicinity." One who holds himself out as a healer of diseases must, no matter to what particular school or system he belongs, be held to the duty of reasonable skill, in the light of the present state of medical science. *Nelson v. Harrington*, 40 N. W. Rep. 228 (Wis.).

MARRIAGE AND DIVORCE — JUDICIAL SEPARATION CANNOT BE GRANTED TO PARTY GUILTY OF ADULTERY. — Where, on a petition by a wife for a dissolution of marriage on the ground of cruelty and adultery, the husband, in a cross-petition, charged the wife with adultery, and all the mutual charges were sustained by the evidence, *held*, that as the wife had been guilty of adultery, the court could not grant her a decree of judicial separation. *Otway v. Otway*, Court of Appeal (Eng.), May 8, 1888; noted in 85 Law Times, 27, and Weekly Notes, 1888, p. 117.

Drummond v. Drummond, 30 L. T. 117, P. & M., approved; *Otway v. Otway*, 13 Prob. Div. 12, reversed.

NEGLIGENCE — BARE LICENSEE. — Acts done by the owner of fixed property on his premises, which would be actionable negligence if done on the highway, do not necessarily put him under liability to bare licensees, whom he had no reason to know were on the premises. Thus, although a runaway horse on the highway

is *prima facie* evidence of negligence (*Watson v. Weeks*, unreported), the careless act of a farm servant, causing a farm horse to run away and knock down a visitor crossing the farm, does not render the farmer liable to the visitor for any breach of duty. *Tolhausen v. Davies*, 57 L. J. Q. B. 392; noted in 4 Law Quart. 488.

See *Corby v. Hill*, 4 C. B. N. S. 556, and note, for cases on duty of owner of premises to bare licensees.

NEGLIGENCE — IMPUTED NEGLIGENCE. — The plaintiff was injured by being thrown out of a vehicle driven by a person who had invited her to drive, whose efficiency she had no reason to doubt, and over whom she had no control. *Held*, that his negligence was no bar to her recovery against the town for a defect in the highway. *Town of Knightstown v. Musgrove*, 18 N. E. Rep. 452 (Ind.).

The court denied the doctrine of *Thorogood v. Bryan*, 18 C. B. 115. The case of *The Bernina*, 12 P. Div. 58, 57 L. J. Rep. Q. B. 65, was not cited. See 2 HARV. L. REV. 140; and see, also, *Hoag v. R. R. Co.*, 18 N. E. Rep. 648 (N. Y.).

NEGLIGENCE — VOLENTI NON FIT INJURIA. — In an action for negligence against a railway company for injuries sustained by the plaintiff in falling down steps leading to the platform of the railway station, which were in a dangerous condition, it was *held* that an admission by the plaintiff, on cross-examination, that he thought it was dangerous to go down the steps, was not sufficient to entitle the defendants to succeed on the ground that the maxim *volenti non fit injuria* applied, but that the *onus* of proof lay upon the defendants to show that the plaintiff "freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it," and to establish the fact that the maxim applied. *Osborne v. London & N. W. Ry. Co.*, 59 L. T. Rep. N. S. 227 (Eng.); s. c. 38 Alb. L. J. 460.

The authority of *Thomas v. Quatermaine*, 18 Q. B. D. 685, is questioned.

SALE — WARRANTY — RECOUPMENT OF DAMAGES. — A warranty by the vendor of a printing-press, that the machine will work "satisfactorily," does not entitle the vendee to recoup damages in an action against him for the price. If the covenant had been that the press should work well, the ordinary rule would have applied, and the damages would have been the difference in value between a press which would work reasonably well, and that which was actually furnished; but it is impossible to fix the value of a machine which would work to the "satisfaction" of defendant. *Campbell Printing-Press Co. v. Thorp*, 36 Fed. Rep. 414 (Mich.).

The opinion contains a very excellent discussion of the authorities on sales with warranties.

TRUSTS — CONSTRUCTIVE TRUSTS — PURCHASE BY ATTORNEY OF OUTSTANDING TITLE. — An attorney, employed to prepare an abstract of title to land about to be sold by his client, discovered a defect which he concealed. The land was conveyed to the proposed purchaser by a warranty deed. The attorney then, by false representations, procured from the proper parties the legal title for himself. *Held*, that he could not maintain ejectment, since he was a constructive trustee of the legal title for his client's grantee. *Downard v. Hadley*, 18 N. E. Rep. 457 (Ind.).

It is doubtful whether the trust was based on a duty owed by the attorney to the grantee, or whether it was based on the client's equity against the attorney, to which the grantee became entitled by virtue of the warranty.

WATERS AND WATERCOURSES — RIGHT OF THE STATE IN GREAT PONDS. — The State of Massachusetts authorized by statute the city of Fall River to take so much water from a pond called "Watuppa Pond," that owners of land bordering on a natural stream flowing therefrom were greatly damaged. It was *held* that the "Colony Ordinance of 1647," providing that householders shall have free fishing and fowling in any great ponds over ten acres in size within the precincts of the town, and may pass and repass on foot through any man's land, so that they trespass not on corn or meadow land, vests in the State both the *jus publicum* and the *jus privatum* in great ponds, so that it can devote their waters to a public use without compensation to those injured thereby. *Watuppa Reservoir Co. v. City of Fall River*, 18 N. E. Rep. 465 (Mass.).

For a criticism of this case see "The Watuppa Pond Cases," 2 HARV. L. REV. 195. It should be noticed that the statement, made by Chief Justice Morton in his opinion, that by Statute of 1869, c. 384, the State of Massachusetts

released its proprietary right in great ponds under twenty acres in size to the owners of the shores, seems not strictly correct, since the statute purports to release only the right of fishery in such ponds. See P. S. c. 91, §§ 10, 11 and Statute of 1888, c. 318. "Great ponds" appear to remain those over ten acres in size, according to the Colony Ordinance of 1647.

REVIEW.

SELECT PLEAS OF THE CROWN. Vol. I., A.D. 1200-1225. Edited for the Selden Society, by F. W. Maitland. London: Bernard Quaritch. 8vo. xxx and 164 pages.

The Selden Society and its editor are to be congratulated upon the first fruits of this new organization. The work of Mr. Maitland is of the high degree of excellence that was to be expected from the editor of Bracton's Note Book. The translation of the Latin text is especially successful.

Of the many points of historical interest, only one or two can be here indicated. Originally, actions for a battery or for an asportation of chattels were determined by wager of law in the popular courts of the hundred and county. With the growth of the feudal state these actions, except in case of a trivial battery, became convertible, by the addition of the words *feloniter, vi et armis*, and *contra pacem regis* (or *ducis*), into appeals of felony, determinable by wager of battle in the royal courts. Later, by the omission of *feloniter*, the appeal became the familiar action of trespass, with trial by jury. The book before us shows that trespass *quare clausum fregit* had a different course of development. From case No. 35 it appears that there was no appeal of felony for a simple entry upon land unaccompanied by a battery of the occupant, or an asportation of his chattels. Such an entry, like a trivial battery, was, doubtless, regarded as too slight an offence to be visited with the penalties of felony. On the other hand, after trespass became concurrent with the appeal of felony for a battery or asportation, it was but natural to admit trespass *quare clausum fregit* in the *curia regis*, in competition with the similar action in the popular courts.

Cases Nos. 88, 105, and 126 (see also 3 Bracton's Note Book, case No. 1664) make it plain that the much-quoted rule, "A bailee may sue a wrongdoer because he is liable over to his bailor," was an established doctrine at the beginning of the thirteenth century. It seems, also, that in England, as upon the Continent, the bailor could not, in early times, sue the wrongdoer. The bailee had the chattels, the bailor had but a right to have them. In other words, the bailee could, and the bailor could not, prove that the chattels, when taken, were '*sua*.' By regarding the possession of the bailee at will as the possession of the bailor, the courts, in the time of Edward III., gave the bailor also a right of action against the wrongdoer.

J. B. A.

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No. 7.

LIMITATIONS IMPOSED BY THE FEDERAL CONSTITUTION ON THE RIGHT OF THE STATES TO ENACT QUARANTINE LAWS.

II.

HAVING considered the meaning of the term "regulation of commerce," and the test to be applied in order to determine whether a law is such a regulation, let us now inquire whether quarantine laws fall within the class of regulations of commerce permissible to the States. Upon few subjects in our constitutional law are the doctrines still so unsettled as upon the construction of the clause granting the commercial power to Congress. The object of granting this power was twofold. First, to secure uniformity of regulation instead of the discriminating legislation by which the States had taxed and otherwise burdened the commerce of one State for the benefit of another;¹ and, second, to secure better commercial relations with foreign powers.² The clause does not appear in the Constitution in the way in which it was originally proposed. In the "Plan of a Federal Constitution" offered in the convention by Mr. Charles Pinckney, the clause appears thus: "The Legislature of the United States shall have the power . . . to regulate commerce with all nations

¹ *Welton v. State of Missouri*, 91 U. S. 275, 280.

² *Curtis, History of the Constitution*, Bk. iii. ch. iv.

and among the several States."¹ The committee of five to whom Mr. Pinckney's propositions were referred by the convention² reported back the clause unchanged, except that the word "foreign" was substituted for "all" before "nations."³ The committee, consisting of one member from each State, to whom this clause among others was again referred,⁴ added the words "and with the Indian tribes," and struck out the definite article before "power" at the beginning of what is now art. I, sec. 8, of the Constitution.⁵ These alterations were "agreed to *nem con.*," leaving the clause as it now stands. It is to be regretted that we have not the reasons of the committee for making this change, which had the effect of giving Congress power, instead of *the* power, to regulate commerce. But it is not unlikely, as pointed out by Mr. Emmet in his argument in *Gibbons v. Ogden*,⁶ that the change was made in order to discountenance the idea that because certain powers had been granted to Congress they were to be construed as exclusive without more, depriving the States of any further rights to exercise the same powers. It was strongly intimated by Chief Justice Marshall in that case—and his reasoning can be explained on no other ground—that "as the word to 'regulate' implies in its nature full power over the thing to be regulated, it excludes necessarily the action of all others that would perform the same operation on the same thing."⁷ An important doctrine, supplementary to this statement, is laid down by the court five years later, in the case of *Willson v. The Black Bird Creek Marsh Co.*⁸ The court had early held, unanimously, that the power granted Congress to "establish uniform laws on the subject of bankruptcies throughout the United States" did not render the State bankrupt law unconstitutional in the absence of congressional legislation.⁹ Chief Justice Marshall had said, in the opinion of the court: "It is not the mere existence of the power, but its exercise, which is incompatible with the existence of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States."¹⁰

¹ 5 Elliot's Debates, 130.

² *Ib.* 378.

³ *Ib.* 506; 507.

⁴ 9 Wheat., at p. 209 (1824).

⁵ *Sturges v. Crowninshield*, 4 Wheat. 122 (1819).

² *Ib.* 363, 376.

⁴ *Ib.* 503.

⁶ 9 Wheat., at p. 85 (1824).

⁸ 2 Pet. 245 (1829).

¹⁰ *Ib.* 251.

In *Willson v. The Black Bird Creek Marsh Co.*, the Legislature of Delaware had authorized a company to reclaim a marsh by constructing a dam across a small navigable creek in which the tide ebbed and flowed. Willson and the other defendants, the owners of a sloop regularly licensed under the United States navigation laws, had broken and injured the dam in order to effect a passage. In defence to an action of trespass brought by the company, the defendants contended that the statute authorizing the dam was an unconstitutional regulation of commerce, relying on *Gibbons v. Ogden*. The Supreme Court, speaking through Chief Justice Marshall, unanimously held the statute constitutional. They pointed out that the legislation improved the value of the property, and probably the health of the inhabitants, near the marsh, adding: "Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States." Upon the point of regulating commerce, on account of the controversy to which this case has given rise, I quote the language of the court entire; "If Congress had passed any act which bore upon the case, — any act in execution of the power to regulate commerce, the object of which was to control State legislation over these small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, — we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States, — a power which has not been so exercised as to affect the question. We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."¹

This case is interesting as the first in which the court passed upon the constitutionality of a law which they treated as a police regulation, claimed to be in conflict with the power of Congress to regulate commerce. The case has been a source of continual

¹ 2 Pet. 252.

controversy, but it has been repeatedly followed.¹ It lays down the same doctrine as to the power of Congress to regulate commerce that was laid down in *Sturges v. Crowninshield*, as to the power to establish bankruptcy laws. "It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States." The language and reasoning of *Gibbons v. Ogden*, as explained by the shortly following decision in *Willson v. The Black Bird Creek Marsh Co.*, seem to indicate the following doctrine. Congress has *an* exclusive power to regulate foreign and interstate commerce, which, while in exercise upon a given subject, precludes conflicting regulations by the States. The first question, therefore, in every case of a State law claimed to be in conflict with this clause of the Constitution, is whether Congress has regulated this subject.

In order to determine whether Congress has regulated a given subject under its power to regulate foreign and interstate commerce, the court has to construe the legislation, or the inaction, of Congress on that subject, as the case may be, for it is obvious that the absence of express legislation may indicate the will of Congress that no restraints shall be imposed whatever. To consider, first, the effect of legislation, it is to be said that the same question arises whenever a State law conflicts with a Federal one, for the Constitution provides that "This Constitution and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."² As said by Chief Justice Marshall, in *Gibbons v. Ogden*,³ "The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the State legislatures as do not transcend their powers, but though

¹ See *United States v. The New Bedford Bridge*, 1 Wood. & M. 401, 424 (1846); *License Cases*, 5 How. 504, opinions of Taney, C. J., and Catron, J. (1847); *Silliman v. The Hudson River Bridge Co.*, 4 Blatch. 409 (1859); *Gilman v. Philadelphia*, 3 Wall. 713 (1865); *The Passaic Bridges*, *ib.* 782; *Escanaba Co. v. Chicago*, 107 U. S. 678 (1882); *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. Rep. 811 (March 19, 1888).

² Art. vi. cl. 2.

³ 9 Wheat 1, 210, 211.

enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." In that case the law of New York granting to Fulton and Livingston the monopoly of navigation by steam in the State waters was held void, as conflicting with the laws of the United States licensing the navigation of those waters. To take one other example: a State law authorized a bridge, which interfered with the passage of steamboats, to be constructed across a river flowing through several States. The law was held unconstitutional on the ground that commerce upon the river had been regulated by express congressional legislation.¹ Just as it is possible for Congress by express legislation to deprive the States of some of the power to regulate commerce which they previously possessed, so Congress can indicate by express legislation its will that a State shall not be deprived of the right to enact certain regulations of commerce previously permissible and constitutional. This, Congress has done in case of pilotage² and quarantine laws.³ Congress can by adoption make valid a hitherto unconstitutional State regulation of commerce.⁴ But it would seem that Congress cannot authorize commercial legislation by the States, for this would be a delegation by Congress of its powers.⁵ It may be added that when Congress has by statute regulated a given subject, the statute would generally be construed to have expressed the whole mind of Congress upon that subject, so that any additional or supplementary laws by the States would be in conflict with the regulation exercised by Congress.

When, however, there is no express legislation upon the subject, the question whether Congress has exercised its power of regulation over it becomes more difficult; for the inaction of Congress has to

¹ The first *Wheeling Bridge case*, *State of Pennsylvania v. The Wheeling Bridge Co.*, 13 How. 518 (1851).

² U. S. Rev. Stat. 4235; *Cooley v. Port Wardens*, *post*, p. 298.

³ U. S. Rev. Stat., Title lviii.; *Morgan v. Louisiana*, *post*, p. 300.

⁴ Compare the second *Wheeling Bridge case*, *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421 (1855).

⁵ See *Cooley v. Port Wardens*, 12 How. 299 (1857). This point was not passed upon in the decision. See, also, *Gibbons v. Ogden*, 9 Wheat. 1, 207.

be construed. A case which greatly simplified this question, and at the same time offered a solution to the much-vexed problem how far the States had the power to regulate foreign and interstate commerce, was *Cooley v. The Port Wardens*.¹ A pilotage law of Pennsylvania provided that every vessel neglecting or refusing to take a pilot when one could be had, should pay one-half the regular pilotage fee to the port wardens. The plaintiff in error was the consignee of a vessel which had thus neglected to take a pilot. To an action of debt by the Board of Wardens, he set up that the vessel was at the time engaged in interstate trade under a coasting license of the United States. The court, speaking through Mr. Justice Curtis, held that the law was such a regulation of foreign and interstate commerce as may be constitutionally enacted by the States in the absence of congressional legislation on the subject; that the nature of the power to regulate commerce does not in all cases require that a similar power should not exist in the States. "The power to regulate commerce embraces a vast field, containing not only many, but exceedingly various, subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the necessities of navigation. . . . Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." The decision has been treated in the later cases as establishing the rule that, whatever subjects do not admit of a uniform national system, or plan of regulation, may be regulated by the States in the absence of congressional legislation upon the subjects.² The principle of *Cooley v. Port Wardens* has been made by the Supreme Court the basis of a rule of construction applicable to

¹ 12 How. 299 (1851).

² The rule in *Cooley v. Port Wardens* was hinted at as early as *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824). Cases in accord are *case of the State Freight Tax*, 15 Wall. 232, 279, (1872); *County of Mobile v. Kendall*, 102 U. S. 691 (1880); *Transportation Co. v. Parkersburg*, 107 U. S. 691 (1882); *Brown v. Houston*, 114 U. S. 622, 630 (1884), *semble*. Other cases are collected in *Wabash Ry. Co. v. Illinois*, 118 U. S. 557, 585, and *Robbins v. Shelby Taxing District*, 120 U. S. 489, 492 (1886). The principle was lately recognized in *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 676 (1888).

the inaction of Congress. It is thus stated by Mr. Justice Bradley, in the opinion of the court in *Robbins v. Shelby Taxing District*:¹ "Another established doctrine of this court is, that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom." An ample number of cases are cited in the opinion in support of this proposition.² The exception stated by Judge Bradley would seem to indicate that the rule was not absolutely rigid, but simply one of construction. This exception was made the ground of the decision in *County of Mobile v. Kimball*,³ holding constitutional State legislation for the improvement of Mobile harbor. The court say: "Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authority."⁴ In the recent Iowa liquor-law case, *Bowman v. Chicago & N. W. Ry. Co.*,⁵ the court say: "The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the States is conclusive of its intention that the subject shall be free from all positive regulation, or that until it positively interferes, such commerce may be left to be freely dealt with by the respective States." The question whether the inaction of Congress was to be taken as equivalent to a declaration that the interstate transportation of intoxicating liquors should be subject to no restraints, and there-

¹ 120 U. S. 489, 493 (1886).

² To the cases there collected the following may be added to complete the sequence of cases: *Hinson v. Lott*, 8 Wall. 148, 152 (1868); *Welton v. State of Missouri*, 91 U. S. 275, 282 (1875), perhaps the first case where the court lay down the rule; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 702 (1882); *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326, 336; *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689 (1888).

³ 102 U. S. 691, 699 (1880).

⁴ To the same effect is *Transportation Co. v. Parkersburg*, 107 U. S. 691 (1882).

⁵ 125 U. S. 483, 8 Sup. Ct. Rep. 689, 697.

fore State regulation of the subject was excluded, was treated as an exceedingly nice question of construction.¹ Besides general reasoning, the court made use of various statutes of the United States, upon kindred subjects, to interpret the failure of Congress to regulate the matter by legislation.

The preceding discussion of the general doctrines pertaining to the regulation of foreign and interstate commerce has seemed necessary to a clear understanding of the grounds upon which quarantine laws are to be sustained, and the limits within which they are constitutional. The right of the State to enact quarantine laws has been assumed from the beginning in the decisions of the Supreme Court, and was never brought into question down to so late a date as 1885. In *Gibbons v. Ogden*² these laws are named by Chief Justice Marshall as a component part "of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government." It is also said of quarantine laws, "The constitutionality of such laws has never, so far as we are informed, been denied." Many *dicta* to the same effect may be found in later cases.³ In *Peete v. Morgan*,⁴ the court say, "That the power to establish quarantine laws rests with the States, and has not been surrendered to the general government, is settled in *Gibbons v. Ogden*." In *Morgan v. Louisiana*,⁵ the plaintiff in error had obtained in the court of original jurisdiction an injunction against the Louisiana Board of Health, forbidding the collection of the fee allowed for examination of vessels by the quarantine laws of the State. This decision was reversed by the Supreme Court of Louisiana.⁶ The Supreme Court of the United States, speaking through Mr. Justice Miller, expressed an opinion substantially as follows: Since the statute provided that the fees collected should go wholly to defray quarantine expenses, and the fees were in compensation for services actually rendered, there was no tax or duty of tonnage im-

¹ In *Groves v. Slaughter*, 15 Pet. 449 (1841), the court were of the opinion that a State could prohibit the introduction of slaves for the purpose of sales without violating the commercial clause of the Constitution.

² 9 Wheat. 1, 203, 205 (1824).

³ For example, in *City of New York v. Miln*, 11 Pet. 102, 142 (1837); *The License Cases*, 5 How. 504, 581, 632 (1847); *Passenger Cases*, 7 How. 283, 414, 484 (1849); *Gilman v. Philadelphia*, 3 Wall. 713, 730 (1865).

⁴ 19 Wall. 581, 582 (1873).

⁵ 118 U. S. 455 (1886).

⁶ *Railroad and Steamboat Company v. Board of Health*, 36 La. An. 666 (1884).

posed. The law was, indeed, necessarily a regulation of commerce with foreign nations and among the several States, since it interrupted the voyage of vessels coming from other States. Nevertheless, such legislation was permissible to the State, for (1) Congress had expressly recognized the power of the States to enact quarantine laws,¹ and (2) such laws belong to the class of local regulations which are valid until displaced, or contravened by congressional legislation. The subject of quarantine requires rules varying with the locality, and so falls within the rule established by the closely analogous case of *Cooley v. Port Wardens*.

The position taken by the court seems a strong one, although it may not be altogether clear that the subject of quarantine does not in fact admit of a national, uniform plan or system of regulation. At least it may be said that the States have power to pass such regulation because the power of Congress to regulate commerce has remained upon the subject "in its dormant state," for there is express legislation by Congress to show that it has never intended to take away the regulation of that subject from the States. In addition to the cases already cited, there are decisions of the Supreme Courts of Missouri² and Massachusetts affirming the constitutionality of quarantine laws. In the Massachusetts case a regulation was held constitutional which required that *all* rags arriving from any foreign port, before being discharged, should be disinfected in a manner satisfactory to the Board of Health, at the expense of the owner.³ Another ground upon which to sustain such a law as the one just referred to is suggested by the court in *Bowman v. Chicago & N. W. Ry. Co.*, just cited, in order to avoid the argument from analogy used by the dissenting judges. It is said that a State may exclude such articles as infected rags, diseased cattle, or decayed meat, because "such articles are not merchantable. They are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and cause of destruction to human health and life." It may be asked, Who is to determine when a given article is "merchantable," or a "legitimate subject of trade and commerce"? Under the court's decision, the States cannot

¹ U. S. Rev. Stat., Tit. Iviii.

² *City of St. Louis v. McCoy*, 18 Mo. 238 (1853); s. c. 19 Mo. 13.

³ *Train v. Boston Disinfecting Co.*, 144 Mass. 523 (1887). See, also, *Bowman v. Chicago & N. W. Ry. Co.*, 8 Sup. Ct. Rep. 689, 700; s. c. 125 U. S. 465.

decide this question. The court itself would hardly assume the prerogatives. There is nothing left but to construe the action or inaction of Congress upon the subject. Perhaps the case of the infected rags may be distinguished from that of intoxicating liquors, upon the ground that the inaction of Congress is to be construed differently upon the two subjects.¹

Having seen that the power of Congress to regulate commerce does not deprive the States of the right to enact quarantine laws in the absence of express legislation by Congress upon the subject, we will now inquire what limitations that power of regulating imposes upon the scope of the provisions of such laws. Only with great hesitation can any generalization be offered upon a subject as yet so inchoate and undeveloped by decisions, at the same time so important as involving the limits of State power. Some limit, however, there must be. It cannot be permitted that a State, although legislating upon an appropriate subject, should embarrass the commerce of the whole country by unnecessary and indiscriminate legislation. It would be equally improper to deny to a State legislative power to the extent necessary to render effective laws upon subjects appropriate to the States. Between these limits two rules are conceivable: first, to allow the States any *reasonable* regulations; second, any absolutely *necessary* regulations. In such a matter, however, as State interference with foreign and national commerce, it may be said that only that legislation is reasonable which is absolutely necessary. Of course a court would be very loath to decide that a particular regulation of a quarantine law was unnecessary for the protection of health. Yet, however delicate the questions involved, the provisions of a quarantine law are legally no more sacred than any other police regulation; and after every reasonable presumption in favor of their validity, the court is still bound to use its common sense in the matter. The question is, When do State regulations of foreign and interstate commerce permissible in regard to their subject become unconstitutional on account of their scope? The Constitution-makers dealt with just this question in the case of State inspection laws, and have given an express rule in that instance: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be *absolutely*

¹ See U. S. Rev. Stat., Tit. lviii., recognizing the health laws of the States.

necessary for executing its inspection laws.”¹ The true answer to the question proposed is believed to be a generalization of the rule given by the Constitution. It is interesting to notice how near the language of the courts has unconsciously approached that of the Constitution. We shall be necessarily confined, in our inquiry, to analogous cases, for this question has not yet arisen in case of a quarantine law. It has been intimated, however, and can hardly be doubted, that although a State quarantine law may tax a vessel with the cost of inspection,² it cannot constitutionally thus exact more than is necessary to defray quarantine expenses.³ Such excessive fees would probably be treated as in conflict with the regulation of commerce by Congress under the rule established by *Brown v. Maryland*.⁴ Of course the expression “absolutely necessary” is to be taken with a grain of salt, for in one sense no provision is absolutely necessary. Essential to the accomplishment of the purpose of the law seems to be the idea.

It was said by Mr. Justice McLean in the License Cases,⁵ “To guard the health and safety of the community, the laws of a State may prohibit an importer from landing his goods, and may sometimes authorize their destruction. But this exception to the operation of a general commercial law is limited to the existing exigency.” The cases applying this rule are comparatively recent. One of the first is *In re Ah Fong*.⁶ A California statute provided for the inspection of alien immigrants, and prohibited the landing of any person who had been a pauper or was likely to become a public charge, any convicted criminal or lewd woman, unless a fee was paid or a penal bond given on behalf of the vessel to save harmless any State municipality from expense on their account. The plaintiff, a Chinese woman, being detained on board a vessel by order of the inspector, sued out a writ of *habeas corpus* before the United States Circuit Court. Mr. Justice Field conceded that “the police power of the State may be exercised by precautionary measures against the increase of crime and pauperism, or the spread of infectious diseases. . . . But

¹ Constitution, Art. i. sec. 10.

² Passenger Cases, 7 How. 283, 484 (1849); *Morgan v. Louisiana*, *supra*.

³ Passenger Cases, 7 How. 283, 570; Patterson's Federal Restraints on State Action,

117.

⁴ 12 Wheat. 419 (1827).

⁵ 5 How. 504, 592 (1847).

⁶ 3 Sawyer, 144 (1874).

the extent of the power of the State to exclude a foreigner from its territory is limited by the right of self-defence."¹ The statute in question exceeded that limit, and was unconstitutional. Upon the same facts, the same rule was laid down by the Supreme Court in *Chy Lung v. Freeman*,² speaking through Mr. Justice Miller: "We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exists. Such a right can only arise from a vital necessity for its exercise, and cannot be claimed beyond the scope of that necessity." The development of this line of decisions was cut short by *Henderson v. Mayor of New York*,³ a case arising from a similar law of New York, applying, however, to all passengers without discrimination. The court held that the object of foreign immigration admitted of a national uniform rule, and its regulation by the States for any purpose whatsoever was in conflict with the power to regulate commerce granted to Congress.⁴ The question whether or how far the States can exclude *actual* paupers or convicts was left open.

The most important case on this question, and one which may fairly be said to lay down the principle that a State police law cannot constitutionally interfere with foreign or interstate commerce to a greater extent than the strict necessity of the case requires, is *Railroad Co. v. Husen*,⁵ overruling the Supreme Court of Missouri. An act of the Missouri Legislature provided that no Texas, Mexican, or Indian cattle should be conveyed into the State during a period comprising eight months in each year. Transportation of such cattle by railroads or steamboats through the State without unloading was expected, but the carriers were made liable for all damage from Texas cattle-fever communicated along the route. An action was brought against a railroad company under the latter provision. A similar action under an Illinois statute, forbidding entirely the importation or keeping of Texas cattle, had been held constitutional by the Supreme Court of Illinois,⁶ upon the grounds that the act was a police regulation, and therefore it was unnecessary to decide whether or not it was a regulation of commerce;

¹ 3 Sawyer, 152.

² 92 U. S. 275, 280 (1875).

³ 92 U. S. 259 (1875).

⁴ *People v. Compagnie Gén. Transatlantique*, 107 U. S. 59 (1882), *accord*.

⁵ 95 U. S. 465 (1877).

⁶ *Yeazel v. Alexander*, 58 Ill. 254 (1871).

that the extent of prohibition necessary for the purpose of the law was a question for the Legislature, not subject to the supervision of the courts, unless in case of "glaring abuse of power." It is instructive to compare with this the reasoning of the Supreme Court, in their unanimous opinion, delivered by Mr. Justice Strong. The first proposition is, that the law in question "is a plain regulation of interstate commerce, — a regulation extending to prohibition." It is conceded that under the police power a State is justified in excluding "property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases. . . . But whatever may be the nature and reach of the police power, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. . . . While for the purpose of self-protection it [the State] may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection.¹ It may not, under cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce." *Henderson v. The Mayor of New York* and *Chy Lung v. Freeman* are there cited, and it is said: "Neither of these cases denied the right of the State to protect herself against paupers, convicted criminals, or lewd women, by necessary and proper laws, in the absence of legislation by Congress, but it was ruled that the right could only arise from vital necessity, and that it could not be carried beyond the scope of that necessity. . . . They deny validity to any State legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise, wherever it interferes with the rights and powers of the Federal government." The court refused to concur with *Yeazel v. Alexander* in holding that the courts could not inquire whether the prohibition did not extend beyond the dangers to be apprehended, saying, that, as the range of the police power of the State "sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

¹ Quoted with approval by the court in *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 492, 8 Sup. Ct. Rep. 689, 702 (1888). At p. 513, in the dissenting opinion of Waite, C. J., Harlan and Gray, JJ., it is said, "It was only because the Missouri statute embraced cattle that were free from the disease that it was declared unconstitutional."

The doctrine of the case seems to be that a State police law which obstructs interstate commerce to a greater extent than is strictly necessary for the accomplishment of the purpose of the law, is an unconstitutional regulation of commerce. At the argument, counsel were compelled to admit that Texas cattle kept for a certain time away from their native range — for example, wintered in Iowa or Nebraska — would not impart the disease, but would be excluded by the law.¹ The principle of the case applies to quarantine laws as well. The Missouri law seems indistinguishable from a quarantine law, save in the scope of its prohibitory provisions. Instead of only for a few days, the dangerous property was forbidden entrance during eight months; instead of only a few ports, a large territory was included in the prohibition. To that extent the temporary and local character of quarantine regulations was lost. As the court points out, the law provided for no examination to determine what cattle were diseased. A quarantine to be effectual must exclude all persons or property dangerously liable to impart the disease. Texas cattle, not themselves betraying any symptom of disease, it is said, can impart it. Moreover, an examination is material only because it diminishes to a minimum the prohibition of intercourse with the region quarantined against. This reasoning of the court applies with equal force to State port regulations, pilotage, inspection, and quarantine laws. The line must be drawn somewhere, and it is conceived that the rule in the *Railroad Company v. Husen* draws it just where the Constitution makers intended, and indeed at the only place possible in the nature of the subject, giving to the States all necessary power, but protecting foreign and interstate commerce from unnecessary interference. The conclusion we have reached from this line of cases is that a quarantine law whose provisions burden foreign or interstate commerce to an extent greater than the protection of health requires, is an unconstitutional regulation of commerce by the State.

The rule in *Railroad Company v. Husen* would seem to apply with equal force to a quarantine declared, it may be on account of a popular panic, under circumstances in which it was "so clear and palpable as to be perceptible to any mind at first blush" that there was no reason to apprehend danger from the place quarantined against. It may fairly be said to be absolutely necessary

¹ Note by counsel in 6 Cent. Law Jour. 217.

to the protection of the public health that a quarantine should be declared whenever there is reasonable apprehension of danger of pestilence from the place quarantined against, no matter if it turned out later that there was no actual danger. A court ought not, in so serious a matter to interfere except in a case clear beyond a reasonable doubt.¹ But if such a case is before them, it seems the unnecessary regulation of interstate or foreign commerce ought to be declared unconstitutional; for since it was in no sense necessary to the protection of health, it cannot shelter itself under the police power. The question is, not whether danger actually existed, but whether there was sufficient reason to apprehend danger to justify the establishment of a quarantine law; and if this question admits of a reasonable doubt, the quarantine must be declared constitutional, at least unless it is maintained after all reason to believe it necessary has ceased. The only authorities of direct application the writer has found are *dicta* of Chief Justice Taney in The Passenger Cases,² and of the Court of Appeals of Maryland, in an early case.³ Chief Justice Taney goes to the length of saying, "However groundless the apprehension, and however injurious and uncalled for such [quarantine] regulations may be, still, if adopted by the State, they must be obeyed, and the courts of the United States cannot treat them as nullities." These *dicta* would go so far as to exclude any interference by the courts, at least so long as there was no enactment of laws for other and unlawful purposes under color of quarantine laws. In point of authority the *dicta* alluded to cannot be considered of much weight.

There is additional reason to regard as unconstitutional a quarantine regulation clearly not necessary for the protection of health, when the regulation is also manifestly enacted for other purposes; for example, as a commercial retaliation for being quarantined against,—a not infrequent resort in order to compel the

¹ The question left before the court is just such a one as arises when a court is called upon to reverse the action of a jury or a lower court in deciding questions of fact. In order to interfere, the court must be satisfied clearly that upon the evidence presented reasonable men could not fairly have reached that decision. There must be no room for a reasonable difference of opinion. See an article on "Constitutionality of Legislation: The Precise Question for a Court." The Nation, April 10, 1884.

² 7 How. 283, 484 (1849).

³ Harrison v. Mayor and City Council of Baltimore, 1 Gill, 264, 277 (1843). See, also, an article on Quarantine Law in 1 South. L. J. & Rep., pp. 161, 173 *et seq.*

repeal of a quarantine regulation considered to be unjust. It was said by Mr. Webster, in his argument in *Gibbons v. Ogden*,¹ "While a health law is reasonable, it is a health law; but if under color of it enactments should be made for other purposes, such enactments might be void." As is said by the Supreme Court of Massachusetts, in the case of *Austin v. Murray*,² "The law will not allow the right of property to be invaded under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation." In that case the selectmen of the town of Charlestown had been authorized by statute to make regulations for the interment of the dead, and to "establish the police of the burying-grounds." They made a by-law that no one should bring any dead body into the town for burial without the written consent of a majority of the selectmen. One of the grounds upon which the by-law was held void was that it was manifest that it was "not a police regulation, made in good faith, for the preservation of the health." This principle has been recently applied by the New York Court of Appeal, in the Matter of Application of Jacobs,³ holding unconstitutional a law prohibiting the manufacture of cigars in tenement-houses, as depriving persons of liberty and property in the guise of a police regulation. The doctrine was recently approved by the Supreme Court in *Mugler v. Kansas*,⁴ in an emphatic statement.⁵ Constitutional limitations cannot be evaded by adopting the guise of police regulations.

The question before the court in such a case seems to be much the same as the one whether in a given case a tax has been levied, or the right of eminent domain exercised for a public purpose. The rule in case of taxation is thus stated by Judge Cooley: "Primarily, the determination, what is a public purpose, belongs to the Legislature, and its action is subject to no review or restraint so long as it is not manifestly colorable. All cases of doubt must be solved in favor of the validity of legislative action for the obvious reason that the question is legislative, and only

¹ 9 Wheat. 1, 20 (1824).

² 33 Mass. 121, 126, (1834).

³ 98 N. Y. 98 (1885.)

⁴ 123 U. S. 623, 661 (1887);

⁵ *Dicta* to the same effect will be found in *State v. Fisher*, 52 Mo. 174, 177 (1873); *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 587 (1887); *Powell v. Commonwealth of Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, April 9, 1888; s. c. 16 Wash. Law Rep. 272.

becomes judicial when there is a plain excess of legislative authority. A court can only arrest the proceedings and declare a levy void when the absence of public interest in the purpose for which the funds are to be raised is so clear and palpable as to be perceptible to any mind at first blush."¹ A very similar question has arisen in case of the regulation by the Legislature of corporations holding inviolable charters. Such laws, purporting to be police regulations, "must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not under pretence of regulation take away from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise."² If it be clear and manifest beyond a reasonable doubt that under color of quarantine a regulation seeks to accomplish other and unlawful purposes, a court is authorized to declare it unconstitutional. It seems necessary, however, that an express constitutional provision should be violated.

It may be contended with some force that when a quarantine regulation is not a *bonâ fide* exercise of police power, it deprives a person of liberty or property without due process of law, within the meaning of the Fourteenth Amendment. As we have seen, it is practically impossible for "process of law" to be provided by quarantine laws on account of their necessarily summary character. It is, of course, out of the question that one compelled to submit to sanitary regulations imposed to prevent actual or reasonably apprehended danger should be heard to say that his constitutional rights had been violated simply because, as it turned out, there was no danger of his communicating the disease. "Such a position, if pushed to its logical conclusion, would utterly overthrow the exercise of the police power by the State."³ But in the case we are now considering, the police power is out of the question. That the deprivation is only temporary can make no difference. The question would, however, be a nice one, for

¹ Cooley, Princ. Const. Law, 58, 59. See, also, *S. & V. R. R. Co. v. City of Stockton*, 41 Cal. 147, 175 (1871); *The Tide Water Company v. Coster*, 18 N. J. Eq. 518, 521 (1866).

² Cooley, Const. Lim. 4th ed. 719.

³ *State v. Addington*, 77 Mo. 110, 117 (1882), an oleomargarine case. See, also, *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 531 (1887).

while the person in quarantine is forcibly prevented from going to the only place to which he desires to go, from carrying his goods to the only point to which he chooses to take them, he is unrestricted as to going or taking his goods anywhere else.¹ An act prohibiting the manufacture or sale of substitutes for dairy butter, however wholesome, was held unconstitutional in New York, on the ground that the statute being clearly only a colorable police law, the makers of oleomargarine were deprived of their liberty without due process of law.² The same view is expressed by Mr. Justice Field, in *Mann v. Illinois*.³ "By the term 'liberty,' as used in the provision [Fourteenth Amendment], something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with equal rights of others, as his judgment may dictate for the promotion of his happiness."⁴ When the action of one becomes inconsistent with the equal rights of others, it is the province of police legislation to determine.⁵ This idea has been paradoxically expressed as follows: "By the police power we understand a power vested in executive officers of the government under certain circumstances to deprive a person of liberty or property without process of law."⁶ According to this view, the moment the quarantine regulation ceases to be a *bonâ fide* exercise of police power, it violates the Fourteenth Amendment by depriving a person of liberty or property without due process of law.

¹ Compare *Bird v. Jones*, 7 Q. B. 742.

² *The People v. Marx*, 99 N. Y. 377. See, also, *Matter of the Application of Jacobs*, 98 N. Y. 98 (1885). The decision in *State v. Addington*, 77 Mo. 110 (1882), and *Powell v. Commonwealth*, 114 Penn. St. 265 (1886), are not *contra* upon this point, for they proceed upon the ground that the law must be considered a *bonâ fide* police regulation for the prevention of fraud, such as, for example, an act prohibiting the sale of pure milk mixed with pure water. *Commonwealth v. Waite*, 11 All. 264 (1865). The Pennsylvania decision has since been affirmed by the Supreme Court, upon the ground that the court was unable to affirm that the legislation had no real or substantial relation to the protection of the public health, or the prevention of fraud. If such were not the case, however, it is intimated that the Fourteenth Amendment would be violated. *Powell v. Commonwealth of Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992 (April 9, 1886); s. c. 16 Wash. Law Rep. 262.

³ 94 U. S. 113, 142 (1876).

⁴ See, also, the *Slaughter-House Cases*, 16 Wall. 36, dissenting opinion of Bradley, J., at p. 122; Swayne, J., at p. 127.

⁵ *Mugler v. Kansas*, 123 U. S. 623, 660 (1887).

⁶ 6 N. J. Law Journal, 135.

It is conceived, however, that such a regulation may be held unconstitutional without resort to the doubtful, and, as the writer believes, strained, constitutional construction of the above view. In the case of *Crandall v. State of Nevada*,¹ the Supreme Court held unconstitutional a statute of Nevada imposing a tax of one dollar upon every person transported out of the State by a carrier, upon the ground, amongst others, that it was one of the rights of citizens of the United States to have access to the seat of government, the ports of entry, and the various Federal offices and courts throughout the United States. As no constitutional principle works in isolation independently of others, it is improbable that a *bonâ fide* police regulation of a State would be treated as a violation of this right. Yet when the law, purporting to be for the protection of health, establishes a quarantine clearly for other purposes, it would seem to be no longer within the protection of the police power, and to become unconstitutional under the decision of *Crandall v. State of Nevada*, as "abridging the privilege or immunities of citizens of the United States," in violation of the Fourteenth Amendment.² Such a law would also be, it is conceived, necessarily an unconstitutional regulation of commerce by a State. If, as we saw reason to think, a State cannot, even in the *bonâ fide* exercise of its police power, burden foreign or interstate commerce to an extent greater than is absolutely necessary to accomplish the purpose of the law, *à fortiori* a State cannot regulate such commerce under the mere pretence of police legislation. Whatever may be thought of the rule in *Railroad Co. v. Husen*,³ it seems beyond question that a State cannot in the guise of police regulations impose burdens or restrictions which, as in case of quarantine laws, operate directly and immediately upon foreign or interstate commerce itself.⁴

The above considerations apply to quarantine regulations enacted by the States as well as to those enacted by local or general boards of health, acting under powers conferred by the Legislature. In the latter case, however, there must be considered the additional element, in what terms the delegated powers are granted. It is surmised that such a board would seldom be found, upon a

¹ 6 Wall. 35 (1867); and see *Corfield v. Coryell*, 4 Wash. C. Ct. 371, 381.

² See *Slaughter-House Cases*, 16 Wall. 36, at p. 79 (1872).

³ 95 U. S. 465 (1877).

⁴ *Supra*, p. 277.

true construction, to have power to declare a quarantine for any other purpose than the protection of the public health.

One other limitation upon the rights of the States to enact quarantine laws remains to be considered, namely, the effects of quarantine legislation by Congress under its power to regulate commerce. If Congress can constitutionally enact quarantine laws, as we have seen the Constitution make them, the "supreme law of the land," all conflicting State legislation becomes void. That Congress has the right to pass quarantine laws has been the opinion expressed by some of the greatest commentators upon the Constitution.¹ If a quarantine law is in its nature a regulation of foreign and interstate commerce, it follows that Congress has power to enact it. In the language of Judge Cooley, repeatedly quoted by the Supreme Court,² "It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and to whatever extent ground shall be covered by these directions, the exercise of State power is excluded. Congress may establish police regulations, as well as the States; confining their operation to those subjects over which it is given control by the Constitution."³ Turning to judicial opinions, it is intimated by Chief Justice Marshall, in *Gibbons v. Ogden*,⁴ that possibly Congress has power to pass laws upon such subjects as quarantine "for national purposes" where the power "is clearly incidental to some power which is expressly given."

It is said by Mr. Justice Wayne, in the *Passenger Cases*,⁵ that the States retain under the Constitution "qualified rights to protect their inhabitants from disease; imperfect and qualified, because the commercial power which Congress has is necessarily connected with quarantine. And Congress may, by adoption, presently and for the future, provide for the observance of such State laws, making such alterations as the interests and convenience of commerce

¹ Tucker's *Blackstone*, App. 251 (1803); 2 Story, *Const.* 1071; Cooley, *Princ. Const. Law*, 74; *Const. Lim.* 5th ed. 724 (*586). The opposite view is taken in an article upon *Quarantine Law*, 1 *South. L. J. & Rep.* 160 (1881).

² *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215 (1884); *W. U. Telegraph Co. v. Pendleton*, 122 U. S. 347, 355.

³ Cooley, *Const. Lim.* 5th ed. 724 (*586).

⁴ 9 Wheat. 203, 204 (1824).

⁵ 7 How. 283, 424 (1849).

and navigation may require, always keeping in mind that the great object of quarantine shall be secured." That Congress has power to assume entire control of the matter of quarantine is taken for granted by the court in *Morgan v. Louisiana*.¹ Indeed, at this time the question seems hardly to admit of doubt.

The principal actual legislation of Congress upon this subject has been as follows:² The first act upon the subject, approved May 27, 1796, authorized the President "to direct the revenue officers, and the officers commanding forts and revenue-cutters, to aid in the execution of quarantine, and also in the execution of the health laws of the States, respectively, in such manner as may to him appear necessary."³ This was repealed by the Act of February 25, 1799,⁴ preserved in Title LVIII. of the Revised Statutes. This act requires United States revenue and other officers to observe, and, under the direction of the Treasury, to aid in the execution of the health laws of the States. Additional clauses provide specifically for the execution of the United States revenue laws in such a manner as not to conflict with State quarantine laws. The Act of April 29, 1878,⁵ provides that no vessel or vehicle, coming from foreign ports or countries where contagious or infectious diseases may exist, or carrying persons, merchandise, or animals affected with such disease, shall enter any port of the United States, or pass its boundaries with foreign States, contrary to the provisions of the quarantine laws of any State into or through which the vessel or vehicle may pass, and except subject to additional regulations, to be prescribed as the act provides. This language is broad enough to cover quarantines by land as well as by sea. The act also provides for reports by the United States consuls of the sanitary condition of infected ports, and of vessels leaving for the United States having on board passengers or merchandise from districts infected with cholera or yellow fever. The Surgeon-General of the Marine Hospital Service is charged with the duty of framing additional rules and regulations for the execution of the act not in conflict with the present or future

¹ 118 U. S. 455, 464 (1885).

² Collected in House Report, No. 392, 43d Cong. 1st Session.

³ Story's Laws of U. S. 432.

⁴ Story's Laws of U. S. 564, or 1 U. S. Stat. at Large, 619.

⁵ 20 U. S. Stat. at Large, 37, or 1 Supplement to Rev. St. of U. S. 313. See, also, *ib.* pp. 480, 501, for the acts establishing a national board of health, with advisory powers.

State or municipal quarantine regulations. The medical officers of the Marine Hospital Service and customs officers are required to aid in the enforcement of these rules. Provision is made to employ State quarantine officers in the national system, and to establish quarantines at ports where State or municipal ones do not exist, if necessary. Pains are taken that quarantine regulations under State laws shall not be interfered with. The details of the act are somewhat elaborate, and may be laid to provide a national system of quarantine supplementary to and concurrent with the system of the States. In the matter of the importation of infected cattle and hides, Congress has enacted health laws, more stringent than quarantine regulations, resembling the law of Missouri held unconstitutional in the case of *Railroad Company v. Husen*.¹

The principal conclusion of this article may be stated as follows: A State may not constitutionally, in the exercise of its police power, either enter the domain of legislation, which, under the Constitution, exclusively belongs to Congress, or violate the prohibitions imposed by the Constitution upon the States. For example, it seems a State cannot constitutionally enact a law which operates, to the extent of regulation, directly and immediately upon foreign or interstate commerce itself. To this rule, quarantine laws, perhaps upon historical grounds, form an exception. In determining whether a statute is a regulation of commerce, the operation of the law, not the intention of the Legislature in passing it, is the test to be applied. State laws which operate upon foreign or interstate commerce only indirectly, secondarily, and remotely, are not unconstitutional as regulations of commerce. The power of Congress to regulate commerce with foreign nations and among the several States does not exclude commercial regulations of a subject by the States, except when the power of Congress is in exercise upon that subject. Congress may exercise its power of regulation either by express legislation, which, to the extent that the will of Congress is expressed, abrogates all conflicting State laws; or by refraining from legislation, which, except in case of subjects to which a national uniform system of regulation is not appropriate, is to be taken generally as indicating the will of Con-

¹ *Supra*, p. 304. The acts of Congress are found in 14 U. S. Stat. at Large, 1, 3, or U. S. Rev. Stat. ss. 2493-2495 (1865 and 1866).

gress that foreign and interstate commerce shall be subjected to no restraints. But such subjects as do not admit of a uniform national system of regulation may be regulated by the States, where these subjects have not been regulated by congressional legislation. State quarantine laws are constitutional as coming under this exception, or, perhaps, on account of the dormancy of the power of Congress to regulate commerce, in relation to the part of the subject of quarantine covered by these laws. Yet a State cannot by the provisions of a police law burden or obstruct foreign or interstate commerce to a greater extent than is essential and necessary for the accomplishment of the purpose of the law. Therefore the burdensome provisions of a State quarantine law must be essential to the protection of the public health. A quarantine, under State laws, which is established for other purposes than the protection of health, is unconstitutional, for the above reason that, being no longer a *bonâ fide* exercise of police power, it abridges "the privileges or immunities of citizens of the United States," and, possibly, because it deprives persons of "liberty or property without due process of law," in violation of the Fourteenth Amendment. Under the power to regulate commerce, Congress can assume control of the whole subject of quarantine. From that time all State legislation upon the subject, in conflict with the laws of Congress, would be void. Hitherto, however, Congress has intentionally left the States free to regulate quarantine for themselves.

Blewett Harrison Lee.

HARVARD LAW SCHOOL, May, 1888.

GREAT PONDS

THE increasing needs of the public for pure water-supply have recently called attention to the rights of the State in the Great Ponds of Massachusetts, which were consecrated by far-reaching provision to public uses as long ago as the ordinance of 1641-7, by a devotion sufficiently broad, says Mr. Justice Hoar, "to include all public uses as they arise." The liberality of the State has, in times past, allowed the fisheries of certain of these ponds, under twenty acres in extent, to be controlled by abutters.¹ It has also, by the terms of sundry water-works acts, allowed mill-owners on their outlet streams to be compensated by towns taking such great pond water.² Such policy has, with the march of events, ended, and it appears to be now the policy of the Commonwealth to assert fully its ancient rights in great ponds, and to permit its municipalities to take water therefrom without paying mill-owners below, any more than the State itself would be legally bound to pay, — that is, nothing. This form of expression in the recent water-works acts of Fall River (1886), New Bedford, Malden, Ayer (1887), Ashburnham, Maynard, etc. (1888), was adopted in order not to preclude any right that the mill-owners might think sustainable in the courts of law. The case of the mill-owners of Fall River has reached a decision.³ A majority of the court decree against them on comprehensive grounds, derived from the operation of the above ordinance in this State, its purposes and uses as long construed, its displacement of antecedent common-law views, if such views ever had validity. The minority of the court dissent, and hold that the mill-owners have legal right that the great pond waters shall enter into the outlet stream and come to their mills, and that the Commonwealth cannot enact otherwise without compensation. It is not proposed in this article to examine the views of a majority of the court. Their position did not call for any exhaustive inquiry as to what a watercourse is. To the dissenting opinion, however, it is abso-

¹ P. S. chap. 91, sects. 10 and 23.

² Watuppa Res. Co. v. Fall River, 134 Mass. 267.

³ 18 N. E. Rep. 465 (Mass.). For summary of the case see 2 Harv. L. Rev. 291.

lutely essential to establish the proposition that a great pond of three thousand acres, or a lake, is a brook, a stream, a river. Until this point is established in a miller's favor, he has no standing and no right to discuss the measure of the public title under the ordinance of 1641-7. Is it so established in the dissenting opinion? Does the dissenting opinion treat fully this important question as a question of reason and historic law, to say nothing of its possible modifications in Massachusetts?

The opinion cites many authorities to maintain that a right to a stream is sacred, and that not even the State can divert without compensation. No one doubts this. It proceeds to say, in the clean-cut English of Mr. Justice Knowlton, that the "State has no better right to divert water from the river by drawing it out of the pond, than by drawing it from the river, *for the river and pond are parts of a natural water-way, through which the water passes from its sources to the sea. Together they constitute a single system and natural feature of the country, the preservation of whose form and identity is essential to the enjoyment of all the property bordering upon their waters.* As against riparian owners below, every reason which forbids the diversion of water from a swiftly flowing stream is equally strong to prevent diversion where the water moves more slowly on its way to its outlet. And this has been distinctly adjudicated in cases of high authority, and, so far as we are aware, without contradiction ;" and, after citing several cases,¹ treats our topic no further, but proceeds to grapple with the ordinance of 1641.

We are not quite convinced that the plaintiff is yet entitled to such grapple ; that he has yet made out his *prima facie* title at common law. The reasoning is hardly so full as such a momentous extension of title might call for. The italicized statement is, of course, intended as a legal proposition, for the agreed facts do not contain it, and do contain the fact that in the pond "there is no perceptible current whatever."

The water lawyers hoped for a full discussion here upon the topic whether and when a lake is a watercourse. They have seen

¹ Gardner v. Newburgh, 2 Johns. 162; Smith v. Rochester, 92 N. Y. 463; Clinton v. Myers, 46 N. Y. 511; Hebron Gravel Co. v. Harvey, 90 Ind. 192; Dudden v. Guardians of the Poor, 1 H. & N. 627; Howe v. Norman, 13 R. I. 488; Shaefer v. Marthaler, 34 Minn. 487; West v. Taylor, Ore., April 4, 1887, 13 P. R. 665; Cummings v. Barrett, 10 Cush. 186.

many books entitled *Law of Watercourses*, *Law of Running Waters*, less about the law of still waters or the law of lakes, and almost nothing about the intermediate case, where there is a lake with one brook running out of it and another running into it. They are hardly satisfied when told that a riparian's rights are to configuration of the soil from mountain-top to the sea. They do not find any such fearfully broad doctrine in the books. They know that infinite changes in territory between the outlet riparian and the mountain-top may be legally made, to his very great prejudice; that forests may be felled on the upland slopes so that the water that comes to his mill may come in disastrous floods. They know that extensive marshes and swamps above him may be legally drained by their owners, so that his mill-wheel stops; that the surface water of thousands of acres may be legally diverted, so that he can never use its propelling force. They know that the passage of rains and melting snows over the surface for twenty years gives no title to its continuance.¹ They know that an intercepting sink, currentless, intercepts the miller's title, though a watercourse may exist both above and below the sink. They know that subterranean percolations, an enormous source of every river's supply, can be legally diverted. They were told by the court² that, even being a "natural water-way" is not enough to make it a watercourse, unless there is a current. They do not know that the "form and identity of the natural features of the country" is enough to give the miller any title to surface water, subterranean water, marsh water, swamp water, though all of them are important sources of supply to every "natural water-way."

In fact, they do not find in the books that he has any right at all extending from his mill to the mountain-top, unless there is a regular watercourse all the way, unbroken, with definite channel and a perceptible current, with a bed and sides or banks. They ask to know why the courts have been so careful to inquire whether the situation amounted in fact to a watercourse, *e.g.*, why Lewis, C. J.,³ says, "To entitle it to the consideration of the law, it is certainly necessary that it should be a watercourse in the proper sense of the term;" and they have come to believe that the miller's right only extended as far as the water was in the

¹ 10 Gray, 28.

² *Godfrey v. Macomber*, 108 Mass. 221.

³ *Wheatley v. Baugh*, 25 Penn. St. 528; also *Bigelow, C. J.*, 2 Allen, 589.

shape of a watercourse ; that his title was under the law of "running waters" only ; and that a plaintiff miller by no means makes out a case against a diverter by merely putting in proof configuration from sea to summit, unless other facts show it constitutes an unbroken watercourse from the point of diversion to the mill.

The dissenting opinion does not restate the facts in the Fall River case, and we therefore refer to them. The Watuppa Lake comprised three thousand acres ; its surplus water tumbled down a hill on which stood the mills. They were established under the mill act of the State ; but that is not of importance, for the riparian's title exists, if at all, without any mill act, and the only question is as to its limit up stream. The city water was taken by a pump two or three miles distant from the outlet.

The agreed facts find that there was "no perceptible current whatever." Did, therefore, any watercourse, in point of law, continue clear through the lake, several miles long, or did the watercourse in which the plaintiff had a right commence at the point where the water started into motion at the outlet ? Was the water a single legal watercourse to the mountain-top, or was it intercepted, broken up into several, by objects that were not watercourses ?

In Massachusetts this inquiry, in this precise form of a common-law question and irrespective of the ordinance, has not been adjudged in favor of the miller. *Cummings v. Barrett*¹ is cited on both sides. The uncertainty therein expressed by Judge Shaw in 1852 was a noteworthy circumstance, as in seeking for an analogy to a great pond, he says, "Perhaps a running stream may form one, and apparently a strong one." But an analogy is not *idem*. He also says, "Water taken from the body of a pond never could be water flowing from the pond ;" and he calls the claim a "new claim,"—a "new and unsettled right."

*Tudor v. Cambridge Water Works*² gives us no help. An imprudent demurrer to a bill stuffed with strong averments was overruled, of course. *Fay v. Salem Aqueduct Co.*³ is also cited on both sides. We will venture a remark on this case, premising that all now assent to the doctrine that an abutter's right in running water is no mere easement, but a part and condition of his realty. If Spring Pond was part of a watercourse, Mr. Fay had

¹ 10 Cush. 186.

² 1 Allen, 164.

³ 111 Mass. 27.

such right, and, in fact, all of this alleged "watercourse" (Spring Pond) that was above low-water mark was on his land. It would be a valuable part and condition of his realty. It was taken away from him, and to his complaint Judge Gray replies thus: "The pond and water belonged not to him, but to the public;" "no part of the petitioner's estate has been actually taken." This suffices for the present discussion. The opinion could not have been written if the court believed Mr. Fay to be a riparian upon a watercourse. If a watercourse, Mr. Fay's abutting right would be also valuable whether he owned the soil under any of the water or not.¹

It seems, also, that the opinion in *Hittenger v. Eames*² could never have been written if the shore owner had the rights of a watercourse riparian. Would the court have said, "The owners of the shore (of the lake) have no peculiar rights in the waters except by grant of the Legislature"? So, too, of *Gage v. Steinkrauss*.³ "As owner of the shore he had no title whatever in the water or ice." What singular language to use in respect of an owner on a watercourse! Stealing water frozen would be no more virtuous than stealing it unfrozen. But it was not a watercourse; it was a great pond.

In the foregoing we discern indications of Massachusetts judicial opinion. The long-continued title in great ponds (now of priceless value) will, irrespective of its own dominant authority, doubtless influence in this State the question, if it shall ever need to be met by the whole court, as to the point of origin as a watercourse. We have long since settled the title in the land under great ponds by a rule unlike that of certain Western States. It seems likely that the law of running waters will not be extended to waters that do not run, especially when the public peril in so doing is now obvious. Such extension in Massachusetts would be a hypothecation forever of these glorious free public reservoirs, to pay claims of mill-sites and bank-owners. There will be ambiguous cases, of course. A river may widen out to the semblance of a pond. The best text-writer on these topics, Mr. Gould (1883), sums up thus: "Fresh-water lakes are distinguishable from rivers chiefly by the fact that they have no current.

¹ Gould, sec. 148; *Lyon v. Fishmongers Co.*, 1 App. Cases, 662.

² 121 Mass. 546.

³ 131 Mass. 222.

The fact that there is a current from a higher to a lower level does not make that a river which would otherwise be a lake ; nor does a lake lose its distinctive character because there is a current in it for a certain distance, tending toward a river which forms its outlet. On the other hand, the fact that a river broadens into a pond-like sheet, with a current, does not deprive it of its character as a river."

The New Hampshire court indicates a similar view.¹ Below Lake Winnepiseogee is an outlet river, with large spaces called "bays" along the river. The question arose whether one of these was a river or a lake. The court says, "It may be none the less river, if it is called 'bay'; on the other hand, it may be so connected with the river as to form a body of standing water, and not be considered a part of a river. These bodies of water may be lakes of themselves, in which case there are two or more rivers. Or they may be in some instances mere enlargements of a river. In this case there is a current which would indicate that at that place (the bridge) is a river." The case was sent to a jury to ascertain whether, at that place, it is a river or not. The judge instructed that it depended on the fact whether there was a regular and steady and perceptible current or not. The full court used this expression, "A sheet of water in which there is a current from its head towards its outlet is not, *therefore*, a river."

The cases cited from other States in the dissenting opinion do not convince us. They will, of course, be read attentively. *Smith v. Rochester*² does not say a lake is a watercourse. There was no finding whether there was a current or not. It was held, under a water-works act, that said act recognized and provided for damages to outlet millers. This is exactly the case of 134 Mass. 267, and nothing more. In passing, the court says, "The doctrine of riparian ownership is inapplicable to the vast fresh-water lakes or inland streams of this country, or the streams forming boundary lines of States." But the court does not say how much vastness, nor whether a "great pond" is vast, nor why a State line thus limits this "condition of realty." *Clinton v. Meyers*² was an issue between two millers. Nobody raised our point. The court only decided questions as to unreasonable use of dam, etc. *Howe v. Norman*² decides that defendant shall not divert a spring which

¹ *State v. Gilmanton*, 9 N. H. 461; S. C. 14 N. H. 471.

² *Supra*, p. 317, note 1.

flows in an indefinite channel over his land into plaintiff's, and cites the Dudden case. It has been held several times that a definite subterranean watercourse is none the less a watercourse for being subterranean. The spring was a portion of such a watercourse. This case tells us nothing about the law of lakes. *Gardner v. Newburgh*¹ is similar. *West v. Taylor*¹ decides nothing as to Lake Cullaby itself, but only a question between two owners on the outlet, which was an ambiguous sort of thing, apparently with a current, but resembling a swale or surface depression about as much as a brook. One diked it off his land on to the plaintiff. The court held, this outlet on its facts amounted to a watercourse. *Shaefer v. Marthaler*¹ was an issue between two shore owners on a pond of four and one-half acres (probably private property). The court held that one owner must not drain the pond, thinking it not mere surface water, but a valuable reservoir. They do not decide it to be a watercourse. No outlet miller or riparian on the stream was a party, and we do not know who owned the bottom. This case is an interesting one, as it appears to declare that in Minnesota the abutters on, or owners of, a beautiful pond have some community of interest in it, but does not reach an assertion that the land-holders below have interest too, nor that the community among stream riparians is the same community as that among pond riparians. The point adjudicated in this case was differently decided in a Massachusetts great pond case.² *Hebron Gravel Road Co. v. Harvey*¹ is also interesting as approaching our topic, but not exactly reaching it. Plaintiff complained of flooding by a dam across a "running stream of water called Lake Headley." The court queries whether the "body of water called Lake Headley was a running stream, or was it merely surface water? The complaint says it was a large stream of running water, and does not show that it was mere surface water." It is spoken of repeatedly as the "so-called Lake Headley." Instruction to jury was, "if you find its waters at north-east end percolated through gravel so as to reduce its waters with unusual rapidity, so great as to create a drawing or movement of the waters to that end, *though imperceptible to ordinary observation*, then it was a watercourse." There was evidence that the water passed through the porous gravel with such rapidity as to create a continuous current from south-

¹ *Supra*, p. 317, note 1.

² *Fay v. Salem*, 111 Mass. 27.

west to north-east, and that this had always been so. The jury were told not to find for the plaintiff unless they should find from the evidence that the so-called Lake Headley was not mere surface water, but was and had been a permanent watercourse, such as the court described. The italicized words above favor the miller's view more than any case we have seen ; but it is still apparent that this "so-called Lake Headley" was an ambiguous thing, the characteristics of which we cannot very well learn from the report. It resembled a brook in some respects, and a lake in some. Such doubtful cases must go to a jury, and it did so. But why need it go to a jury at all, if the view of the dissenting opinion in the Fall River case is sound? It goes to a jury because some outflowing lakes are not in fact *watercourses*. That is, the lake is not a watercourse unless upon its character the law of running water can in fact reach it, and it is not a watercourse merely because it is a link in a "water-way" from summit to sea. The word "link" had better be dropped. It may be a severance, and not a link. In New York the bottom of the Mohawk belongs to the State (like that of a great pond in Massachusetts). The State diverted the water, and the court held, "Riparian mill-owners are not entitled to any damage against the State."¹ In *Broadbent v. Ramsbottom*² defendant owned a pond of six acres, the overflow of which went into the plaintiff's brook. The court held, "Plaintiff's right cannot extend further than the flow into the brook itself and to the water flowing in some defined natural channel. Before it reaches such defined channel the land-owner has the right to appropriate it. He has a right to drain his pond and his marsh also."

In *Chasemore v. Richards*,³ Wightman, J.: "Such a right as claimed would deprive a man of the right of draining his land" (or the State of Massachusetts from draining or filling its great ponds). Chelmsford, J., in *Roustrom v. Taylor*,⁴ says, "The use which any owner in a running stream may claim is only of the water which *has* entered into and become a part of the stream."

Thus far the books ; and it really seems that in Massachusetts the alleged title in the outlet riparian has never been established, nor has it in England or elsewhere. Of course those cases where towns have paid damages to millers under the conditions of water-

¹ 33 N Y. 465.

³ 7 H. of L. 359.

² 11 Exch. 602.

⁴ 11 Exch. 367.

works acts are without use in this discussion. Those towns took *per formam doni*.¹

The law of running water originated in natural right. If A owns a section of a brook he owns it as such, and ought not to dam it back upon its up-stream neighbor; nor ought the up-stream neighbor to withhold it from A. Such duty and right grow out of motion, continued, definite, perceptible movement of that part of the realty we call water. When a drop of water enters a definite watercourse, it is practically, and fairly, and legally regarded as destined to reach A, with its benefits of user, power, etc., and the law of running waters arose. No such course of thought, no such desired legal adjustment of correlating rights, call for such law in respect of waters that do not move. Till the water-drop has reached the natural guide which is to compel it to the plaintiff's wheel, it is free. He has no title in it, whether it be in the air, in a bog, or surface water on a hill-side. The great Dismal Swamp is an enormous sponge on top of the ground. The surplus of rain-drops which the sponge cannot hold, seep and percolate about till eventually enough of them coöperate to form a channel, and then a watercourse begins.

Many legal rights have their limitations in practical rules for action, and the limit of the right of a riparian on a watercourse is not to the mountain-top, whence in theory the drop starts, but at the point where it becomes practically and substantially condemned, and in channel guidance to the miller's wheel. On the surface slopes of some mighty glen, swale, or mountain-side, the drop has not yet reached or become a part of the miller's title, for it is not yet a watercourse drop,—it is a surface-drop which any land-owner may exhaust or divert at will. When the drop is stagnant in some marsh or swamp which leaks out into a brook, it still has not reached the miller's title, for the marsh-owner can drain his marsh or swamp elsewhere.

Thus far we find settled law, and show how serious are the limitations of this configuration title alleged to extend from mill to mountain. There is another intervenor as to the character and effect of which it is not ours to decide. That is the still-water lake. Shall the rule of practical sense, above set forth, govern this case, and say it is not a watercourse, or shall the miller at Niagara be

¹ *Watuppa Co. v. Fall River*, 134 Mass. 267; *Smith v. Rochester*.

legally entitled to the waters of Michigan and Superior, and to his suit if the Illinois water-way is opened? Will not the court say to the miller, "We have long told you that you have no right whatever in surface water. Nor do you have any in still water. Running waters originated your title, and to them it is limited too."

There are in the Mississippi valley long lagoons, bayous, full of water but closed at each end, miles in length and but a few rods in width, most frequently curved like a crescent. Their ends have closed, but the swamp waters keep them full. No one would claim that these are watercourses, or anything but extremely elongated ponds, with uses and values very different from those of unnavigable brooks. In Massachusetts¹ there would be no community of interest in the shore-owners. In Minnesota there might be, but even there not the identical community of interest that obtains among riparians on a stream; and, if we may use such a word, it could not be right to force the lake partners into the partnership of stream partners.

That is to say, given a large lake, it will not be pretended that in Massachusetts its hundreds of shore titles are in any sense loose or otherwise tenancies in common of any reservoir. There is no occasion for a body of law to arise to adjust their correlating rights.

They do not interdepend, certainly not as riparians upon running water do. Therefore no similar body of law has come into existence to regulate lakes. Let us suppose, too, that the large lake has an outlet over which its surplus waters pour, when there are any, into a watercourse. But the lake itself below the bed-rock of the outlet remains forever changeless, perhaps a hundred feet deep. It is not going very far to claim that not only the surplus surface water, but the permanent water, too, should be in law condemned to aid in maintaining the mill-flow, and be regarded as a river? Blackstone says water is a species of land. Is it not logical to say that the changeless bottom water of the lake is legally identical with a mere marsh in which no brook-owner has any right, and that the surplus water from rains, etc., is mere surface water, like surface water anywhere else, on a field or hill-slope, in which, also, no brook-owner has any title till it forms itself into a watercourse with its banks and current; that is to say, at the point where it

¹ 111 Mass. 27.

leaves the lake? Is not that the point of demarcation of title? Below that point its destination to the miller has, in point of fact, become assured, sufficiently for the law to treat it as assured, and subject it to the law of running waters. Blackstone thinks water, like a bird, to be of a wild, untamable nature, and that any title to it involves a kind of possession. Perhaps the law has gone far enough when it says that if it gets into my spout or my watercourse it is mine. Suppose a lake has several outlets, of which watercourse would the lake form a part? Suppose in summer the deep lake delivers no water into any outlet, shall this Commonwealth, with all its great title of 1641, have no right to use the motionless waters? If the court of this State ever has to meet the exact question, whether to adopt as a part of the common law of running waters this broad claim of the millers, it may well hesitate, and say such adoption would be strange and novel, and would not consist in this State with the ancient freedom of great ponds from all private title.

It is conceivable that a brook may originate now or in the future. Probably most lakes antedate their outlets. Select a great pond that has no outlet. The State can drain it, and no abutter can complain;¹ nor can any stream riparian, for there is no stream. So the ownership is entire and indisputable in the State. Suppose, by topographical changes, extensive gradings for ornamental grounds, parks, streets, railway-cuts, and embankments, multiplication of street-gutters, alteration in forest-tracks, etc., etc., the watershed increases and the pond rises. Of course the State's title in the increased water is entire. Let it rise still more till it threatens to overflow its lowest bank. Doubtless the State, by dike or drain, could prevent such overflow. But having no present occasion for the water it does nothing, the water overflows, and in a month or two, wearing for itself a channel and banks, runs a beautiful and useful brook through the lower farms to the sea, to the delight and profit of its riparians. Doubtless *inter sese* the rights of these riparians begin. A few months elapse, and the city of Boston needs relief. Is the State now disabled? Can it no longer dike, no longer pump water for this half-million of its people without paying for it? Have the rights of the riparian A, below, attached not only to the overflow permitted by the

¹Fay v. Salem, 111 Mass. 27.

State, but have they followed up, into, over, and through the lake itself, so as to possess not only the surplus overflow, but so that A may insist that the vast original pond shall remain a sort of elevated table, undrained and unpumped forever, to the end that there shall be an overflow? Which is the fair thing? If the pond were a water-soaked swamp, there would be no doubt about it in law. The swamp-owner could stop the overflow at will, by drains or dikes. Ought the absence of tussocks, flags, weeds, bushes, vegetable-mould, etc., etc., to make any difference in title? In point of natural right, has really A acquired anything except those drops which have escaped *de facto* from the custody of the swamp or pond owner, and submitted themselves to the custody of the channel-banks of the brook? When the State has, for the period referred to, permitted the overflow of some water, has it waived any of its ancient rights except to the exact quantum of water which it has permitted to escape from its custody into another's? So long as the conductor-pipes of the State House deliver water into an adjacent owner's premises, which he stores in his cistern, the State has lost it; but shall it not, even after a hundred years, divert those conductors into its own State-House cistern for thirsty office-holders? The law is clear in case of an overflow from any artificial reservoir. But it will be said that the great pond supposed is a natural reservoir. What of that? The State's title to the natural reservoir, prior to any overflow, is at least as good as that of the owner of the artificial one. The cultivator of useful fishes in the pond may be satisfied for a time with an imperfect enclosure, through which some of his fishes escape from his title into A's brook and private fishery; but shall not the cultivator mend and tighten his enclosure when he sees fit? The legal possessor of a furious whale may decide to let him go, and quite a body of law has grown up to settle the rights *inter sese* of subsequent pursuers and captors, but no wise in derogation of said possessor while he chooses to retain possession by his line and iron. Shall he who picks crumbs that fall from the rich man's table be entitled to insist upon the continuance of the superfluity and the table too? After all, is not the still pond more legally analogous to the watery swamp than to the running river?

It was the community interest in the brook that built up water-course law. A peculiar article was owned by many. Some texts used to call such owners tenants in common. Though the fugi-

tive water-drops passed on and away, the form and value and power of a brook abided. The interrelating rights to it called for some fair principle to be established as the law of the case. How far shall such principle operate and have scope? Probably no farther than the quasi-community of interest in the owners to adjust their respective mill-powers, elevation of dams, and prevent back-water, withholding water, etc., etc. The far-above owner upon the lake shore is not similarly interested in such possible disputes. His disputes with his neighbors on the lake are not the same. There would seem to be no reason why he and his lake neighbors should be included in the body of law necessary for the running-water millers, unless it is a legal reason that millers would make more money if their titles were extended over other people's ponds. So they would, if they could likewise control other people's swamps and hill-sides.

When a question arises in this State whether some principle of the English common law has been adopted here or is adoptable now, an inquiry is made of a somewhat peculiar nature, not by a professor, but by a department of the State government, which does not always exclude reasons of politic wisdom from its determination. First, was the asserted principle known and established prior to our separation from English authority? Second, does it fit appropriately into our system and ways? If it was not established at the time of the Revolution there is not much to adopt, for the views of English courts since that time, even upon historico-legal questions, do not bind us. Nor are the views of judges of other States of very great importance here, for their localities may have their own reasons for "adopting" or rejecting the alleged principle. In the different American tribunals all sorts of reasons,—physical, historic, and otherwise,—usages, unreported practice in inferior courts, professional and popular understandings, etc., etc., bear upon this question of "adoption." The decision might be one way in Pennsylvania and New York, and the other way in Indiana or Oregon. It might specially differ in Massachusetts, where, in respect of great ponds, for two and a half centuries, rules and policies of a special nature have obtained, not known in the Western States.

Our court may well say, "We do not find in the English books prior to the Revolution any hint of the extension of a miller's title in running waters to still waters. We find the courts of New

York and Pennsylvania denying it in respect of great rivers. We cannot see that the knowledge or belief in any such principle influenced acts or transactions here in the colonial and provincial periods. On the contrary, the existence of the ordinance for nearly a century and a half before the Revolution may have excluded from the popular and professional mind, and from the minds of vendors and purchasers, any thought that a miller had title to the waters of a Massachusetts great pond. The very absence to this day, and through one hundred and forty-six volumes of reports, of a decision giving a miller such a comprehensive title is in itself significant. The *dicta* in *Potter v. Howe*¹ and *Trowbridge v. Brookline*² are also significant. We are impressed by the declarations of our own court that "there is no adjudged case in which any right in the great ponds adverse to the public has ever been recognized," "that the devotion of the great ponds to the public use is sufficiently broad to include new public uses as they arise," "that they are not to be appropriated to the use of any particular person," "that the usage and practice under the ordinance seems to have been consistent with the understanding that great ponds were public property" (*West Roxbury v. Stoddard*). We find in 1866, chap. 187, the Legislature authorized towns to divert the waters of great ponds, and this without any provision for compensation to affected millers. *Cole v. Eastman*³ was decided by a unanimous court, and was right, and now the enjoyment by the public of free public waters in great ponds must be placed in the same grade and in as lofty a rank as herrings. It cannot be said that the Commonwealth ranks alewives so superior to common-law title, but remands the mighty subject of the purity and comfort of its people to a lower plane and to a less parental care. There must be no discrepancy as to these public rights which stand on the same legal footing. Never mind the State's past liberality to the millers. Wood-choppers and tolerated squatters long cut into the national forests; but shall not Congress, when it pleases, exert its title to give free homesteads to its citizens without paying toll? So Mr. Cole, of Eastham, owned at common law his fishery, till in the fulness of time it became wise that the supreme title of the Commonwealth should be exerted in favor of the public. In fact,

¹ 141 Mass. 359.

² 144 Mass. 143.

³ 133 Mass. 65.

this great ordinance was a measure of almost divine forecast, and cannot be ignored in determining the adaptability of an alleged, but obscure, perhaps non-existent, English principle.

We find State statutes authorizing its own commissioners and lessees to cultivate useful fishes in great ponds, with power to occupy portions with enclosures without compensation to millers. Such enclosures may presumably be solid dikes, to retain spawn, to keep out hostile fish, or retain the water itself as against natural depletion by the miller's brook. This may be very inconsistent with a miller's right to hold or let off water; very inconsistent with the stream riparian's right, for it will not do to have the Commonwealth's useful fishes dying on bare mud.

The difficulty of establishing the riparian's title to the extent claimed will be shown by its inconsistency in this State, not only with the public ownership of great pond waters, but in this matter of the riparian's fishery. English citations do not avail here. He holds under Massachusetts, and she allows him no fishery title except subject to the public, not even in his own brook where his common-law title would be clear. The same great ordinance of 1641 regulated both water and fishery, and that it dominates the otherwise private fishery title has, in this State, been settled.¹ The court will not have two opposite doctrines under the same ordinance. Mr. Cole owned his fishery at common law. His title to it was clearer than a miller's claim to a great pond. The State exerted its ancient rights under the ordinance and gave the fishery to the town of Eastham, by an act which in terms provided for the payment of all damages, and Mr. Cole went to law for his damages. But the court held he could recover nothing against the State or its grantee, the town of Eastham; that the ancient rights of the State were superior to those of Mr. Cole. And so it is the decided law that a State can give a fishery to a town, which need pay nothing to the common-law owner of the fishery; whereas under some of the water-works acts the public has been made to pay for its water to the miller. Shall this absurd discrepancy longer exist?

In declaring what principles of the ancient common law obtain or do not obtain in this Commonwealth (*e.g.*, in *West Roxbury v. Stoddard*² and many other decisions upon different topics), the

¹ *Cole v. Eastman*, 133 Mass. 65.

² 7 Allen, 158.

highest tribunal of the State voices the unwritten practices, transactions, and views of her people for ages. It declares practical constructions that have become inveterate. It sees in the ordinance of 1641 the coloring that centuries have given it, and things that the closest student of its phraseology might not discern; and they may well hold that colonial wisdom left no footing in this Commonwealth for any such doctrine as alleged; that reasons of loftier utility control here which were dominant and supreme long prior to the Constitution itself.

It may be, therefore, that the query as to the limit of the riparian's title by English common law never will arise as an isolated question here. A moot point, a fancy conundrum, received not much attention from our court. It must come to its bar in connection with our ways, methods, and circumstances of all these years.

Nor can we expect if the Fall River case reaches Washington, that this debate concerning the metes and bounds of a "species of land" will be continued there. It is not a Federal question.

Thos. M. Stetson.

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1. The principle underlying the maxim *volenti non fit injuria*, and the application of the maxim in cases where a servant sues his master to recover damages resulting from the master's failure to comply with the statutory requirements designed to secure the safety of the servant.

2. The extent to which, in the United States, private rights of property may be affected without compensation by the exercise of the police power.

3. The obligations of railroad companies impliedly assumed by the exercise of the power of eminent domain or the acceptance of State aid.

The essays must be sent on or before June 1, 1889, to Louis D. Brandeis, Esq., Secretary of the Association, Room 13, 60 Devonshire street, Boston.

Messrs. Austen G. Fox, Samuel B. Clarke, and Victor Morawetz, of New York, the committee who selected the subjects, will also award the prize.

THE following extract is taken from President Eliot's Annual Report:¹—

"The Law School had a year of great prosperity in 1887-88. The number of students increased twenty per cent., the Story Professorship was filled again, after having been vacant four years, and the Harvard Law School Association gave the school \$1,000 with which to increase the amount of instruction in Constitutional Law during the year 1888-89.

"The Dean's report gives much information about the sources of the supply of students for the Law School. . . . It appears that the States which have yielded a steady supply of students since the three years' course was established in 1877-78, are California, Illinois, Maine,²

¹ Annual Report of the President and Treasurer of Harvard College, 1887-88, p. 14.

² Except in one year.

Massachusetts, Missouri,¹ New Hampshire,¹ New York, Ohio, Pennsylvania,¹ and Vermont. As regards colleges other than Harvard which feed the School, the Dean's tables show that one hundred and twenty-five institutions scattered all over the country have sent four hundred and sixty-three students in eighteen years, but that only four — namely, Amherst (with twenty-five graduates), Bowdoin (with nineteen), Brown (with twenty-eight), and Yale (with forty-seven) — can be said to be constant contributors. Dartmouth (with eighteen graduates), Michigan (with twelve), Oberlin (with thirteen since 1877-78), Princeton (with thirteen), and Williams (with eighteen), have been less regular contributors; and no other institution has sent more than nine students in the eighteen years which the tables cover. . . . As the Dean points out, the most important change which has taken place in the School since 1870-71, apart from improvements in the scheme and methods of the instruction, is to be found in the increased length of residence of the average student."

PROFESSOR LANGDELL'S report, as Dean of the Law School, contains a number of tables of great interest, showing in detail the attendance at the Law School during the last eighteen years; the results of the various examinations; the number of honor degrees; the States, countries, and colleges from which the students have come since 1870; and the fractional part of each Harvard College class, since 1834, which it has sent to the Law School.²

The following table, based upon two tables in the report, shows the number of the new students who have entered the School in each year, during the last eighteen years, together with the total number of students in all classes registered during each year:—

YEAR.	Harvard Graduates entering.	Graduates of other Colleges entering.	Non-Graduates entering.	Whole Number of New Students entering.	Total Number of Students registered.
1870-71 . . .	19	41	45	105	165
1871-72 . . .	26	30	36	92	138
1872-73 . . .	22	25	40	87	117
1873-74 . . .	29	29	37	95	141
1874-75 . . .	40	15	47	102	144
1875-76 . . .	39	28	52	119	173
1876-77 . . .	47	30	51	128	199
1877-78 . . .	47	32	32	111	196
1878-79 . . .	38	24	40	102	169
1879-80 . . .	59	17	48	124	177
1880-81 . . .	41	19	31	91	161
1881-82 . . .	29	24	44	97	161
1882-83 . . .	33	23	28	84	138
1883-84 . . .	47	14	25	86	150
1884-85 . . .	56	23	22	101	156
1885-86 . . .	35	25	28	88	138
1886-87 . . .	46	34	33	113	188
1887-88 . . .	52	30	52	134	225

¹ Except in one year.

² President's Report, pp. 92-105.

[It will be remembered that the three years' course went into operation in 1877-78.]

"It is," as is pointed out in Professor Langdell's report, "only in . . . graduates of Harvard College that the School has had any growth during the last eighteen years in respect to the number of students who have entered it. In that class the growth has undoubtedly been great, but yet not greater than the classes in Harvard College."

The graduates of other colleges "who have entered the School during the last eighteen years have come from no less than one hundred and twenty-four different colleges, no one of which has sent an average of three in each year, and only one of which (Yale) has sent an average of two in each year. . . . It seems pretty clear . . . that the number of students coming to the School from other colleges has diminished since the establishment of the three years' course, but it also seems probable that the lowest point has been reached, and that now an improvement is going on."

The non-graduates "who have entered the School during the last eighteen years have come from forty-four different States or countries, while no one State or country, except Massachusetts, has furnished an average of three in each year, and only two besides Massachusetts (namely, New York and Ohio) have furnished an average of two in each year. Massachusetts has furnished an average of twelve in each year." The figures "seem to show that the number . . . has been gradually diminishing ever since the establishment of the three years' course and the examination for admission." . . .

"The years 1886-87 and 1887-88 have been distinguished for a large increase in the total number of students entering the school, the number having risen from 88 in 1885-86, to 113 in 1886-87 (an increase of 25), and to 134 in 1887-88 (an increase of 21). . . . In the now current year, the total number of new entries is less by 21 than at the corresponding date of 1887-88." [This decrease, it is pointed out, is chiefly in the number of non-graduates entering the School. The large number (52) of such entries in 1887-88 seems to have been entirely "abnormal."]

"The greatest as well as the most important growth that the School has had during the last eighteen years in undoubtedly to be found, not in the number of students who have entered the School, but in the length of time that students have remained in it; and in this latter particular the current year is not disappointing; for the falling off in new entries is more than made up by an increased number of old students, the total number appearing in the annual catalogue for 1887-88 being 215, while the total number to appear in the annual catalogue of the current year will be 217."

In the nine years since the Law School honor degree was established, from 1879-80 to 1887-88, inclusive, it has been granted to only 65 students.¹

¹ President's Report, p. 94.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

CONSPIRACY — RESTRAINT OF TRADE — COMBINATION TO KEEP UP FREIGHT RATES AND EXCLUDE RIVAL TRADERS. — An association of a number of ship-owners was formed to obtain a monopoly of the homeward tea trade, and keep up the rate of freight, by offering a rebate on freight to all merchants shipping exclusively by the association vessels. *Held*, that as the association was formed with the view of keeping the trade in their own hands, and not with a malicious intention of ruining the trade of other ship-owners, or through any personal ill-will towards them, it was not an agreement in restraint of trade, and was not in unlawful conspiracy. The association did not pass "the line which separates the reasonable and legitimate selfishness of traders from wrong and malice." *Mogul Steamship Co. v. McGregor, Gow, & Co.*, L. R. 21 Q. B. 544 (Eng.).

See *Marshall v. Penn. R. R. Co.*, 92 Pa. St. 150, *accord*.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — APPOINTMENT OF RECEIVER. — An act which provides that, upon the dissolution of a corporation by legislative action, the attorney-general shall bring suit to wind up its affairs, and may, upon application to the court, procure by an *ex parte* order the appointment of a receiver who shall take possession of the property and convert it into money, ascertain and determine the liabilities of the corporation, and distribute the assets, is unconstitutional, because it amounts to a taking of the property without due process of law from those in whom it would legally vest in trust under the laws of the State; viz., the managers and directors at the time of dissolution. "The court has, by virtue of its general jurisdiction over trusts, authority to appoint to a vacant trusteeship, and, perhaps, for cause, to remove fraudulent, dishonest, or incompetent trustees, and appoint others to perform the duties of the trust, in order to avoid a failure thereof; but we know of no authority for a court to appoint a receiver of property vested in trustees, without cause, and without notice to them, or opportunity afforded to defend their title and possession." *People v. O'Brien*, 18 N. E. Rep. 692 (N. Y.).

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — OBLIGATION OF CONTRACTS — EFFECT OF REPEAL OF CHARTER ON CORPORATE PROPERTY. — The Broadway Surface Railroad Company was duly incorporated under the laws of New York State, and procured the necessary grants from the city of New York to lay tracks and to run cars over Broadway. It then, as it was permitted by statute, mortgaged its property as security for bonds issued by it, and entered into contracts with connecting lines. In 1886 statutes were passed dissolving the company, and directing the grants made by the city to be sold and the proceeds to be paid to the city, wholly ignoring the rights of stockholders, mortgagees, and contractors. This legislation was *held* unconstitutional, except that portion which operated to dissolve the corporation.

The questions which arose were, first, whether the dissolution of the corporation necessarily destroyed its property, so that the State could do what it pleased with what had been the corporate franchises, without violating the constitutional provision against taking property without due process of law; secondly, what was the effect upon the charter of a reservation of power by the State to amend or repeal laws and charters.

(1.) It was said that the repeal of the charter, under a power reserved by the State, although destroying the corporate life did not destroy the corporate property, except in so far as such property is dependent upon the existence of the corporation for its lawful enjoyment; but that the dissolution of a corporation has no "other operation upon its contracts or property rights than the death of a natural person upon his." As it was said in *Fletcher v. Peck*, 6 Cranch, 135, "When a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest these rights." There-

fore the stockholders, mortgagees, and those having contract rights against the corporation were still secured by its property, not being affected by the legislation of 1886, which was an "undisguised attempt to take away . . . its property, and bestow the benefit thereof upon the municipality of New York," without due process of law.

(2.) Even if the Legislature should expressly reserve the power to take away or destroy the property of the corporation acquired under the authority of the charter, it is doubtful if an exercise of such power would be constitutional; but the State is clearly unable to take away or destroy the corporate property, where the same has been lawfully pledged or conveyed, as it was here. Further, it would seem that even the power reserved to the State to amend or repeal the charter is restricted, not giving the right to violate the contract at will, but merely the right to terminate the contract and to regulate, to a certain extent, the internal administration of the corporation. Anything further is repugnant to the contract itself.

It was also said that a statute in force at the time the charter was granted, providing that the State, in altering or repealing the charter, should not impair any remedy for liabilities previously incurred, not only correctly formulates the law applicable to the case, but is part of the contract between the State and the corporation, and as such cannot be violated without coming within the prohibition of the Federal Constitution against impairing the obligation of contracts. *People v. O'Brien*, 18 N. E. Rep. 692 (N. Y.).

It should be observed that the majority of the court were willing to dispose of the case on the ground that the suit was not properly brought, but expressed an opinion, as above, out of deference to the minority.

CONSTITUTIONAL LAW — INDICTMENT FOR INFAMOUS OFFENCES. — A crime, the punishment of which is imprisonment in a State prison or penitentiary, although without hard labor, is an infamous crime within the meaning of the 5th Amend. to the U. S. Const. — *United States v. De Walt*, 9 Sup. Ct. Rep. 111.

CONSTITUTIONAL LAW — POLICE POWER — IMPAIRING OBLIGATION OF CONTRACT. — *Semble*, that a State statute requiring a reduction in the rates of street-railroad fares is an exercise of police power, and is not unconstitutional as impairing the obligation of a contract entered into between two street-railroad companies to carry passengers at a certain fixed rate. *Buffalo East Side R. Co. v. Buffalo St. R. Co.*, 19 N. E. Rep. 63 (N. Y.).

CONTRACTS — GROSS INADEQUACY OF CONSIDERATION — CONCLUSIVE EVIDENCE OF FRAUD. — When a consideration for a contract is grossly inadequate, equity will set aside the contract, upon the ground that such inadequacy is conclusive evidence of fraud. *Phillips v. Pullen*, 16 Atl. Rep. 9 (N. J.).

COPYRIGHT — REPORTS OF DECISIONS — JUDGES AND OFFICIAL REPORTERS. — Under Rev. St. U. S., §§ 4952 and 4954, a judge who, in his judicial capacity, prepares the head-notes, statements of cases, and opinions for the published reports, cannot be regarded in such sense as their author or proprietor as either to take out a copyright thereupon, or to convey a copyright title by assignment to the State or to an individual. *Banks v. Manchester*, 9 Sup. Ct. Rep. 36.

But an official reporter, although a sworn public officer, receiving a fixed salary for his labors, can, in the absence of statute, take out a copyright on law reports published by him, which will cover all the parts of the book, such as statements of facts, head-notes, index, etc., which are not included in the written opinions of the court. *Callaghan v. Myers*, 9 Sup. Ct. Rep. 177.

CORPORATIONS — LIABILITY FOR NEGLIGENCE. — The plaintiff was injured by the fall of seats erected in a negligent manner by a county agricultural society for the convenience of its patrons. *Held*, that the society was liable in its corporate capacity without special legislative enactment. Corporations of the class usually called quasi-corporations, which are mere territorial or political divisions of the State, or invested with governmental functions, or those which are formed without the consent of the persons who constitute them, are "not liable to a private action in damages for negligence in the performance of their public duties, except when made as by legislative enactment;" but those entered into by the persons composing them, generally with the hope of profit, are liable. *Dunn v. Brown Co. Agricultural Soc.*, 18 N. E. Rep. 496 (Ohio).

The dictum of the court with reference to the liability of quasi-corporations

seems to be correct only if, under the term "public duties," those duties are meant which are imposed alike upon all quasi-corporations of the same class, and those duties are excluded which follow from the management of property or the possession of rights which a quasi-corporation has voluntarily assumed for its own advantage as a corporation, or which have been imposed upon it with its own consent, express or implied. With reference to such duties the same rules apply to public as to private corporations.

CRIMINAL LAW — POLICY OF THE LAW — INSTRUCTIONS. — It is not error for a court to refuse to instruct, that the policy of the law deems it better that many guilty persons should escape, rather than that one innocent person should be punished. *Burgess v. Territory*, 19 Pac. Rep. 558 (Mont.).

DAMAGES — INTEREST. — Interest cannot be added by the jury to discretionary damages awarded by them for a personal injury. Only special damages, computable upon direct or indirect evidence of actual values, can be thus increased. *Western & A. R. Co., v. Young*, 7 S. E. Rep. 912 (Ga.).

EVIDENCE — PRIVILEGED COMMUNICATIONS — WAIVER OF CLIENT'S PRIVILEGE. — Where a defendant enters upon a line of defence involving something that has transpired between himself and an attorney, whose client he was, and testifies to the same, he thereby loses his right to object to the attorney's testimony as to the same matter. "The privilege is that of the client alone," and is thereby waived. *Hunt v. Blackburn*, 9 Sup. Ct. Rep. 125.

EXECUTORS AND ADMINISTRATORS — SET-OFF — DEBT BARRED BY STATUTE OF LIMITATIONS. — In an action by a legal representative of deceased to recover his distributive share, an administrator cannot set off against the claim a debt of the plaintiff to deceased which is barred by the Statute of Limitations. *Harrod v. Carder's Adm'r*, 3 Circ. Ct. (Ohio) 479.

The following are in accord with the principal case: *Drysdale's Appeal*, 14 Pa. St. 531; *Reed v. Marshall*, 90 Pa. St. 345; *Milne's Appeal*, 99 Pa. St. 483.

But see *contra*: *Courtenay v. Williams*, 3 Hare. 539; *Rose v. Gould*, 15 Beav. 189; *Coates v. Coates*, 33 Beav. 249; *Gee v. Liddell*, 35 Beav. 629; *Hill v. Walker*, 4 K. & J. 166; *In re Cordwell's Estate*, L. R. 20 Eq. 644; *Garrett v. Pierson*, 29 Iowa, 304 (*semble*); *Cummings v. Bramhall*, 120 Mass. 552 (*semble*); *In the matter of Bogart*, 28 Hun, 466.

EXECUTORS AND ADMINISTRATORS — WHEN CHARGEABLE WITH INTEREST. — An administrator who holds in his possession funds belonging to the estate, but does not use them for his own advantage and derives no benefit therefrom, is not chargeable with interest. *Smith v. Smith*, 8 S. E. Rep. 128 (N. C.).

The rule is laid down in 2 Wms. Exec. (7th ed.) 1844, that an executor may be charged with interest when he has been "guilty of negligence in omitting to lay out the money for the benefit of the estate."

EXTRADITION — PROSECUTION OF PERSON EXTRADITED FOR ANOTHER CRIME. — A person extradited from one State to another, cannot be prosecuted in the latter State for an offence other than that for which he was extradited, unless he has had a reasonable time and opportunity to return. *State v. Hall*, 19 Pac. Rep. 918 (Kan.).

The court say that this rule of law, when applied to civil cases in this country, "is sustained by nearly the entire, if not the universal, current of authority. When applied to criminal cases, where the extradition is from a foreign country, it is sustained by almost all authority. When applied, however, to criminal cases where the extradition is from a sister State, a majority of the cases is against the rule, and, as we think, without any good reason."

GRAND JURY — QUALIFICATIONS — FORMER OPINIONS. — A grand juror testified that he formed an opinion that defendant was guilty, from testimony heard while sitting as grand juror on another case. *Held*, that the opinion so formed did not disqualify him as grand juror in this case. "The opinion which disqualifies is one formed from something heard outside, which has none of the sanction of an oath, and is merely hearsay." *People v. Northey*, 19 Pac. Rep. 865 (Cal.).

HUSBAND AND WIFE — SEPARATE ESTATE — TERMS OF TRUST DEED. — A statute forbidding a wife to bind her separate estate by any assumption of her husband's debts, does not prevent the wife from mortgaging, with her husband's consent, and for his debts, property which he had conveyed to a trustee for her

sole benefit, authority being given to the trustee in the deed to mortgage the property on request of the husband and wife. Public policy, it is said, does not demand that the statute be extended "to destroy a power expressly bestowed, and render property inalienable which the donor granted upon condition that it might be conveyed as specified." *Brodnax v. Aetna Ins. Co.*, 9 Sup. Ct. Rep. 61.

This is an extreme example of whittling away a statute by judicial construction. The principle of this case seems to be that a statute forbidding certain uses of a wife's separate estate does not apply to her separate estate which was conveyed with an express condition that it might be used in a manner forbidden by the statute.

MORTGAGES — FUTURE ADVANCES — PRIORITY OF LIEN. — To the extent of the sum limited in it, and as against subsequent incumbrances, a recorded mortgage is entitled to priority for future advances made without actual notice of such incumbrances, though it is not expressed to be for future advances, and the agreement making it such is verbal. *Tapia v. Damartini*, 19 Pac. Rep. 641 (Cal.).

NEGLIGENCE — CHILD — "DUE CARE." — The "due care" required of a child nine years of age is not such a degree of care as the average child of that age would exercise, but such care as the capacity of the particular child in question enables it to use. *Western & A. R. v. Young*, 7 S. E. Rep. 912 (Ga.).

NEGLIGENCE — DUTY OF REPAIRING FIXED PROPERTY ABUTTING ON HIGHWAY. — A public highway which terminated at the boundary of the defendant's premises had been continued by a private way over his land. The defendant built a wall six feet high across the end of the public highway, shutting off the private way. Trespassers pulled down this wall, leaving a remnant about seven inches high across the dividing line of the two roads. The defendant, knowing the condition of the wall, left it for several days unrepaired and unlighted at night. The plaintiff was driving in the night on the public road, on what he supposed to be a continuous thoroughfare, and his horse was injured by the remnant of the wall. *Held*, that he could recover damages from the defendant. *Wills, J.*, "In this case there was a practical invitation to the public to go across this piece of private property belonging to the defendant. Now, if the owner of the premises was aware of the true state of affairs, he must have known that some person or other would be likely, especially in the dark, to drive over the whole length of the road. . . . He had, therefore, a duty cast upon him to prevent the injury." *Silverton v. Marriott*, 59 L. T. Rep. N. S. 61 (Eng.).

NEGLIGENCE — VIOLATION OF CITY ORDINANCE — RAILROADS. — It is negligence, as matter of law for a railroad company not to use the precautions for safety at public crossings, expressly prescribed by a valid statute or city ordinance. *Western & A. R. Co. v. Young*, 7 E. S. Rep. 912 (Ga.).

See in accord with the principal case: *Petrie v. R. Co.*, 7 S. E. Rep. 515 (S. C.); *Kyne v. R. Co.*, 14 Atl. Rep. 922 (Del.).

PARTNERSHIP — ASSIGNMENT OF FIRM PROPERTY FOR BENEFIT OF CREDITORS. — A partnership is a distinct entity entirely separate from that of any one of its members. An assignment by the partnership, therefore, of all the firm property for the benefit of firm creditors is not rendered fraudulent and void by a failure to include the individual property of the partners. *Trumbo v. Hamel*, 8 S. E. Rep. 83 (S. C.).

This case is important in that it adopts the mercantile conception of a partnership as a legal person, and refuses to follow the long line of English and American cases, which treat a partnership as a collection of persons jointly liable.

PARTNERSHIP — WHAT PASSES TO ASSIGNEE OF PARTNER'S INTEREST. — *Held*, that the statute of uses and trusts has no application to an assignment of a partner's interest in partnership property, real and personal, to be held in trust for the assignor, because partnership property, while in the hands of the firm as a legal entity, is to be treated as personal property; and furthermore, the assignment vested no present interest in specific articles of property, but the right transferred was a mere chose in action entitling the assignee to sue for a copartnership accounting. *Greenwood v. Marvin*, 19 N. E. Rep. 228 (N. Y.).

STATUTE OF FRAUDS — SUFFICIENCY OF MEMORANDUM. — Plaintiff's salesman took defendants' verbal order for more than fifty dollars' worth of paints, reduced it to writing and forwarded it plaintiff. Defendants subsequently wrote to plaintiff saying, "Don't ship paint ordered through your salesman." Before the

letter was received the goods were shipped, and the defendants refused to receive them. *Held*, that, in the absence of any evidence that any other order was given, the language of the letter must be regarded as referring to the order of which a memorandum was made by the plaintiff's salesman, and so constituted evidence sufficient to go to the jury, as a memorandum in writing complying with the Statute of Frauds. *Louisville Asphalt Varnish Co. v. Lorick*, 8 S. E. Rep. 8 (S. C.).

There is an able dissenting opinion. See also Blackburn on Sales, 2d ed. 44.

STATUTE OF LIMITATIONS — OWNER'S LACK OF POSSESSION — INTERVAL BETWEEN SUCCESSIVE DISSEISINS. — Under the Statute of Limitations of 3 & 4 Will. IV., c. 27, when a disseisor abandons land of which he has taken possession, the seisin thereupon reverts in the lawful owner without entry on his part, and the statute ceases to run against him. If, therefore, after an interval in which the land is not occupied, a second disseisor enters, the Statute of Limitations begins to run against the lawful owner only from the time of the entry of the second disseisor. *Semble*, however, that if the possession of the two disseisors had been continuous, the statute would run from the entry of the first disseisor. *Agency Co. v. Short*, 13 App. Cas. 793 (Eng.).

That, under this statute, if the second intruder disseises the first, and does not represent the same *persona* or estate, the statute will run against the owner only from the entry of the second disseisor, even though the two disseisins are continuous, see lecture note, 1 HARV. L. REV. 248, at 249.

For the distinction between the Statute of Limitations of 3 & 4 Will. IV., c. 27, which has been followed in some of the more modern American statutes, and that of 21 Jac. I., c. 16; from which they are more commonly copied, see lecture note, *supra*; also Langdell on Equity Pleading, § 111 *et seq.*; and *Chapin v. Freeland*, 142 Mass. 383, digested 1 HARV. L. REV. 48.

TRADE-MARKS — RIGHT TO USE AFTER DISSOLUTION OF PARTNERSHIP. — *Semble*, that a retiring partner who assents to the continuance of the business by the other partners at the old place of business and under the old firm name, retains no interest in the good-will of the business, and has no right to use a trade-mark which belonged to the old firm. *Menendez v. Holt*, 9 Sup. Ct. Rep. 143; S. C. 39 Alb. L. J. 7.

WILLS — POWER OF APPOINTMENT — EXECUTION. — The testatrix, having general power to appoint certain real estate by will, devised her property as follows: "I hereby devise and bequeath to my two youngest daughters all my property, real, personal, and mixed, and all my estate of every kind whatsoever and wheresoever situate." She had a life interest in the property, but apart from that and from her power of appointment she had no real estate. *Held*, that her intention to execute her power was plainly apparent, because otherwise the will would be inoperative as to real property, and therefore the will was a valid exercise of the power. *Balls v. Dampman*, 18 Md. Law Jour. 774 (Md.).

REVIEWS.

A TREATISE ON THE LAW OF CONDITIONAL SALES OF PERSONAL PROPERTY. By Charles R. Miller. Cincinnati: Robert Clarke & Co., 1888. 8vo.

With such predecessors as Lord Blackburn and Benjamin, Mr. Miller has not succeeded in adding anything of value to the law of sales. The last American edition of Benjamin by Judge Bennett has so thoroughly exhausted the subject, that there is little room for discussion which will be of service to the profession; and the author has not discussed mooted questions at all, but contented himself with the collection of authorities. Although he apparently intends to treat the subject of conditional sales exhaustively, he does not cite some of the cases which are landmarks in the field; *e. g.*, *Rugg v. Minett*, 11 East, 210; *Turley v. Bates*, 2 H. & C. 200; *Whitehouse v. Frost*, 12 East, 614, and others. This may be due to the author's inclination to rely exclusively on American cases, which is evident throughout the whole book; but such a feature is not commendable to a thorough student of

the system of common law, for a knowledge of the development of law seems indispensable to an understanding of its present condition. The author states the present law briefly and accurately, and hence this work is more convenient than a digest; but it in no way supplants the use of Blackburn for the student or of Benjamin for the practitioner. The index is a model—carefully prepared and exhaustive.

C. M. L.

THE STUDENTS' LAW LEXICON. By William C. Cochran. Cincinnati: Robert Clarke & Co., 1888. 12mo. 332 pages.

By the omission of obsolete words and phrases, and the careful condensation of definitions, this work has been kept within a small compass, and yet nothing of importance seems to have been omitted. A valuable incident of a book of this nature, — namely, the translation of Latin and French maxims of the law, — instead of appearing in the body of the work, has been properly relegated to an appendix. The insertion of a table of abbreviations and references to reports makes the book as complete as could be desired. A law lexicon which is prepared on such a plan, with a view to convenience and general utility, has a modern practical air about it that is refreshing as well as commendable.

A. E. M.

INDUSTRIAL LIBERTY. By John M. Bonham. New York and London: G. P. Putnam's Sons, 1888. 8vo. Pages ix and 114.

This book is designed to call attention to some of the industrial dangers of to-day. The author finds too much irresponsible power in the managers of corporations. He thinks that, because of the *quasi*-public nature of corporations, the officers should be under obligations to the public analogous to those of a trustee. The idea that political sovereignty is vested in the individual units is adopted by Mr. Bonham, and he concludes that all "paternalism" in government is vicious. It must be confessed, however, that he is not particularly strong in the discussion of fundamental principles; and when he comes to test measures by his idea of government, although generally very conservative, he occasionally startles the reader. For instance, he concludes that compulsory education in the common schools is wrong, because of its "paternalism."

It is to be regretted that the suggestions of the book, some of which are very good, were not put into one-half or one-quarter the space, instead of being spread over four hundred pages.

E. I. S.

HISTORY OF THE LAW OF TITHES IN ENGLAND. By William Easterly. Cambridge, at the University Press, 1888. 8vo.

This is the Yorke prize essay of the University of Cambridge for 1887; the subject-matter is exhaustively treated, and the book is certainly valuable to the student of legal history.

C. M. L.

A COMPENDIUM OF THE LAW OF TORTS. By Hugh Fraser. London: Reeves & Turner, 1888. 12mo.

The author's aim is to present a summary of the law of torts for the use of students; and in point of accuracy and brevity he has succeeded better than many of the numerous writers in this field of legal literature. It is not sufficiently exhaustive for the practitioner, and it may be too much condensed for a beginner; but it is admirably adapted to the wants of those who desire to make a hasty review of the law of torts.

C. M. L.

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COMPARATIVE MERITS OF WRITTEN AND PRESCRIPTIVE CONSTITUTIONS.

IN the mind of every intelligent man the question must sometimes arise, whether the political institutions of his country, and especially its constitution, are superior to those of other nations, and, if so, in what the superiority consists. The American who directs his attention to the constitution of the Federal Union is not likely to regard this question as one upon which there can well be a difference of opinion. The establishment of the federal constitution, whether we regard it in the light of its undoubted benefits to the people immediately concerned, or consider its more remote influence upon the institutions of other countries, was an act of organization and of government with which, for value and importance, no other in the history of mankind is comparable. It did not create the American States or the American Union, for these were in existence before; but it saved the States from anarchy, and it settled a tottering Union upon the only basis that was at once a foundation of solidity and of growth, of permanence and of evolution. It converted a loose confederacy into a nation; and that nation, though feeble in its beginnings, has in the compass of a century overflowed and mastered the major part of the continent; and now, in the number and intelligence of its people, in national resources and power, it takes unchallenged place with the leading nations on the globe. History tells no other story of expansion so rapid, of progress so steady, of growth that in its promise appears so assuring. Many causes have contributed to the marvellous

growth, and to the general prosperity and order which have accompanied it ; but chief among them has been the establishment, through the patriotic statesmanship of those who achieved independence, of efficient and stable representative institutions, through the adoption of the constitution of the United States.

The federal constitution was not a perfect instrument ; no instrument of government ever was. If anything can be safely predicated of the divine purpose, it is that mankind shall not remain in a stationary condition, but shall advance from age to age, from a lower to a higher state of being, and this not less in what pertains to government than in other respects. The nineteenth century has been one of marvellous progress, which has nowhere been more marked than in the political institutions of European nations. With the exception of Russia and Turkey, there is, perhaps, not to-day a nation in Europe whose government is not greatly in advance of what would have been possible to establish for it a century ago. England is a monarchy in little more than name, and France, whose people were then under a despotism of almost incredible rigor, is now a republic ; but the wisest and best statesmen of neither of these countries a century ago would have advocated a government on a representative basis such as is now established. The reason that would have been perfectly conclusive against it is that the time had not come when such institutions would be accepted and supported by the people. The wise statesman will not outrun the people in governmental changes ; he must keep them abreast with him if apparent reforms are to be reforms in reality. Like things may be said of Italy and other European countries to those said of England and France ; they have gradually come up to what was impossible when the federal constitution was under discussion. But even the federal constitution, as we now admit, was far from being perfect. Nothing but the paramount necessity of a more efficient Union, and the impossibility of establishing it otherwise than upon a compromise of views, justified the toleration of the great evil of human slavery, in this charter of free government. It was a blot upon an instrument that could not possibly, at the time, have been made immaculate. The fact is now sometimes very thoughtlessly made a ground of accusation against those who framed it ; but, when it is considered that it was the best that at the time was possible, the injustice of such an accusation becomes

manifest. If we insist upon perfect laws, and will have no others, we shall never have any at all ; we shall be left to battle for perfection in a condition of hopeless anarchy. Bad as the compromise was in some aspects, we shall do well to remember that the constitution was the imperative need of the hour, and that to its establishment was due the fact that slavery in the States was at last brought within reach of the power that could strike the fatal blow. A great statesman, given by New York to the Union, once said : " I early learned from Jefferson that in politics we must do what we can ; not what we would." It was a wise saying. In government we must strive for what is best, but we must be content to put up with something less than perfection. The golden rule appeals to the heart and the conscience of the individual man, but it cannot be incorporated in legislation to be enforced by magistrates and the police. And even if it could be, there would be many things in government to which it could have little or no application ; things which concern public policy only, and in respect to which the rules of morality and right give little or no guidance.

No people, however highly endowed in other respects, ever rose above the state of barbarism, unless it possessed the organizing faculty, the genius for law and settled institutions, the willingness to submit to rule, and a perception of its necessity. It was because he had these that the brutal Saxon has in time developed into the law-respecting and law-abiding Englishman and American. Without them he would have been as savage now as he was when we first hear of him. It has been humorously said, but with substantial truth, that if a chance meeting of Americans were to take place in a desert, they would immediately organize and hold an election. The election would mean order and security. Let one of their animals be stolen, and a lynch court would be organized, and perhaps a hanging take place. This, in a sense, would be lawless ; but it might be the first step in a process of evolution that in time would give established courts and eminent jurists to a great commonwealth. The lynch court that gives us rude justice, when no other is possible, is infinitely preferable to no court at all. Americans have not inaptly been called the Romans of the modern world, because of their instinct for political construction, and for laying broad and deep the foundations of governmental structure. Possibly there may be discovered

in their constitution building, as well as in general legislation, a tendency to particularize too much ; to impose too many restraints. This, however, when carefully considered, may prove to be a fault less serious than its opposite, — a fault that, at least, leans to virtue's side. The higher the civilization of any people, the more extensive will be the recognition of inherent and indefeasible rights ; and as these can have substantial value only when the law protects them, our institutions may be expected to expand with social and industrial progress, and the citizen will be subjected to new restraints for the protection of new rights which were either not clearly perceived before, or which have sprung from new conditions. Under our peculiar system we leave these rights, for the most part, to the protection of the States ; but in what I shall say on this occasion I shall avoid speaking particularly of the distinctions between State and Federal law. The proper method of study for the constitutional system of the United States I conceive to be, to consider it as a unity, with all the mutual interaction and interdependence of rights and obligations. Chief Justice Taney once said : " The constitution of the United States, and every article and clause in it, is a part of the law of every State in the Union, and is a paramount law." He might truly have added that State constitutions and laws are a necessary part of the federal system ; the Union itself having been formed and perfected in order to their preservation. This is sometimes overlooked, and the Federal system and the State system are discussed as if each was complete in itself, instead of being, as each is, the necessary complement of the other ; and, in thus discussing them, we get one-sided and imperfect views, which lead us into dangerous errors.

If we compare the constitution of the United States with any constitution that was in existence when it was formed, two things will particularly arrest the attention. The first of these is the greater particularity and completeness of the federal constitution ; the fact that it goes into all the particulars of governmental authority. In other countries such constitutions as then existed were for the most part confined to the settlement of a few leading principles ; scarcely going farther in some instances than to fix the course of descent for the crown. The second is, the constitution of the United States was fully written out ; its every section, sentence, and phrase agreed upon and formulated ; whereas other

constitutions rested altogether in immemorial usage, and were for that reason necessarily somewhat vague and indeterminate. This was the general truth. The constitution of England was exceptional in its completeness, and also in the fact that its leading principles had from time to time been formulated and expressed in public charters. Nevertheless it still remained an unwritten constitution ; its principles evidenced chiefly by usage. No one or two or any number of charters could be pointed to as forming alone or collectively the entire constitution of the realm. The fact that the constitution of England has been so beneficent, and, that it has answered so well the needs of a liberty-loving people, has often suggested the question of the relative merits of written and unwritten constitutions. To us, as Americans, such a question has only a speculative interest. The people of the United States had no choice as between these two methods of expressing the fundamental law ; a written constitution was for them a necessity of the situation. This is manifest from the fact that they were creating a government, and had to agree upon what should be its departments and its officers. When this was agreed upon there were no such immemorial usages determining what powers should be exercised by the one or by the other as existed in other countries, and a definition and limitation of powers were therefore essential. In short, the whole machinery of government required a written expression ; since in this way alone could the powers of those who should have authority under it be defined, and the duties and obligations of citizens be determined. Necessity thus compelling a written constitution, the question of comparative advantages of the written and the unwritten could not possibly be to them one of practical interest. To the student of politics, however, such a question must always have importance, whether it be abstractly considered, or, on the other hand, be examined in the light of illustrative instances. And for the purposes of illustration history presents no other instances which are comparable in value to those of the constitutions of England and of the United States. These two easily rank first in importance because of their strength, their age, their completeness, their hold upon the regard of the people, the great measure of liberty they secure, and the ease with which they admit of safe improvement. This fact of supremacy is so far recognized that all other nations when they enter upon the duty of perfecting constitutional forms, or enlarging constitutional

principles, turn as a matter of course to Britain and to America for enlightenment and direction.

The statesman who for such a purpose contemplates the constitution of England perceives that it is a body of principles and usages resting in prescription, the outgrowth of national history, expressive of national aims and thought, and the national conviction of what is best, or at least is most politic, in government. All these principles and usages have been of gradual establishment, and have been enlarged and improved as a result of a growing spirit of liberty among the people and of concessions to that spirit on the part of the governing classes. I think we may justly call this the natural method of constitution building. No constitution otherwise formed can so completely adapt itself to the needs and thoughts of the people as the one that springs directly from the national life, has been moulded by the events of national history, and constitutes an expression of the popular idea of government, and of what are its proper functions and limitations. It then fits as a garment, and no other will. But history shows us that all government originating otherwise than by formal charter begins in despotism and with a governing family or class; and in the growth of a prescriptive constitution there is necessarily something in the nature of a continuous struggle between the rulers on the one hand and the people on the other,—a struggle which in the main may be peaceful, but is liable at times to blaze out in civil war. Ever since the overthrow of Napoleon I. a struggle of this sort has been going on in nearly every European country, with varying successes and many bloody incidents, but with a general tendency in the direction of greater liberty. The free constitution in any case is only won slowly, and by minute, perhaps imperceptible, advances. We do not mark the changes from year to year; they are commonly seen only from age to age; in time the England of the robber Normans becomes the England in which the representatives of the commons wield the sovereignty, and the crown has left to it little beyond nominal power. It is not unreasonable to assume that nothing could be better or safer than such a growth, or could give better promise of permanency. Nevertheless, an inherent weakness is seen in this: that there may at any time be dispute as to whether any particular principle has so far become accepted that it constitutes a part of the constitution, and the dispute may only be settled through

resort to civil war. Under such a constitution, too, the legislative power is necessarily supreme, and under the influence of temporary excitement it may remodel the constitution at will, and eliminate from it any principle, however important or venerable. It is scarcely possible that the powers of government should be thus abused under a written constitution which, like that of the United States, was the origin of the government itself. Such a constitution is "a code of finalities," or, as some have called it, "a rigid constitution." It creates departments and agencies of government, and confers powers upon them. The very specification of powers is a limitation; and, unless by manifest usurpation, public authorities can exercise none that are not in terms conferred. They cannot, therefore, annul, set aside, or suspend any constitutional principle, for the plain reason that no authority to do so has been given. The declarations of rights which in Britain are merely advisory to parliament are in the federal constitution imperative commands. Chief Justice Marshall stated the principle succinctly when he said: "The government of the United States can claim no powers which are not granted to it by the constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication." As the constitution itself declares: "The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

The weakness commonly inhering in a constitution thus formed is that it is formed regardless of the most important principle of all, namely, the principle of growth and expansion. This has been the radical vice of most European written constitutions; each of them has been framed as if it were the beginning of the nation, instead of being, as it was in fact, merely a step in its progress. No such vice inhered in the constitution of the United States. The instrument is quite as truly a growth as is the constitution of the British Empire; it is in fact a continuation and natural expression of English liberty. As Mr. Lowell has said: "The acorn from which American democracy sprang was ripened on the British oak." Our fathers wisely clung to what their ancestors had won in their long struggles for personal freedom,—and just as wisely appropriated the general principles of government which in the course of ages had become settled and accepted in England. It was only in a very narrow sense that the new government could

be called a new creation: in its separation of the powers of government, in the division of the legislature into two branches, and in the union of the executive as a third branch, the constitution of England was closely followed. We may say the same as regards the bill of rights, which was added to the constitution by amendments; the leading principles are all to be found in *Magna Charta* and other charters of English liberty which the people of America at the time of the Revolution had claimed as a part of their inherited freedom, and demonstrated their right to by their success.

It is worthy of note, however, that the principles of liberty which were thus appropriated were likely to have a somewhat different meaning, and to give a broader protection in America than in England. Adopted in America, they took on to some extent an American sense; they were relieved from implied limitations and exceptions which were known under the English system, but were foreign to American ideas and usages. We imported our law, but in some sense it was raw material to be worked over, and the first step in the process was to relieve it of whatever had come from the recognition of privileged classes, or of classes subject to special burdens. *Magna Charta*, therefore, in its protection of life, liberty, and property by the law of the land means more in America than it did in England; it is more comprehensive, more impartial. Voltaire has an anecdote of meeting, when in England, a boatman on the Thames, who, seeing that he was a Frenchman, with characteristic boorishness bawled out with an oath that he would rather be a boatman on the Thames than an archbishop in France. The next day Voltaire saw this man in prison with irons on, and praying alms from the passers-by; and so asked him whether he still thought as seriously of an archbishop in France. "Ah, sir," cried the man, "what an abominable government! I have been carried off by force to go and serve in one of the king's ships in Norway. They take me from my wife and my children, and lay me up in prison, with irons on my legs, until the time for going on board, for fear I shall run away." A countryman of Voltaire confessed that he felt a splenetic joy that the people who were constantly taunting the French with their servitude were in truth just as much slaves themselves; "but for my own part," said the philosopher, "I felt a humaner sentiment; I was afflicted at there being no liberty on earth." If the Frenchman had come to

America at any time after the Union was perfected he would have found that the declaration that no freeman should be deprived of liberty except by the law of the land was as effectual to save the poor boatman from impressment as it could be for the protection of any other class of the people; for here the principle was not merely general in terms, but in spirit; it took in every freeman, and it protected all equally, the boatman at the dock as much as the merchant on the wharf.

Following up briefly the relative merits of written and unwritten constitutions, it will be convenient, first of all, to consider what are the requisites of a good constitution. These are easily indicated:—

I. A good constitution should be plain and certain in its principles, and as far as possible free from doubt and question. In this particular the advantage of the written instrument over the unwritten usages is too manifest for question.

II. A good constitution must be of gradual formation; it must result from the history and experiences of the people, and be the natural and deliberate expression of their thoughts, wishes, and aspirations in government. It is in this particular that the unwritten constitution is likely to be superior, for that is necessarily the growth of time. Every constitution has its antecedents, but the antecedents of the unwritten constitution are likely to lead directly and naturally up to it, while those of the written are liable to be affected by force, fraud, accident, or the misleading of the facile tongues or pens of demagogues or *doctrinaires*. Mr. Gladstone never uttered a more forcible truth than when he said: "No greater calamity can happen to a people than to break utterly with its past;" but this is precisely what it is likely to be urged to do when it is setting up a new constitution on a change in the form of government. But, as has been shown already, the written constitution as well as the unwritten may be a true growth; it may be framed on the plan of embodying the settled principles already evolved and manifested in the history of the people, and of crystallizing them in exact form, instead of leaving them vague and indeterminate as the unwritten constitution in a measure must do. And this was the plan worked out in the constitution of the United States; it was framed on the principle and with the purpose of preserving for America everything in the British constitution which was suited to the condition and circumstances of the new world; and there is not in all history a fundamental law which is a

more genuine growth. Indeed, the changes in adopting it were scarcely greater than took place in England when the Stuarts were sent over the water and William of Orange was made king.

III. A good constitution should definitely apportion the powers of government between the several departments, and draw such clear lines of distinction as to prevent collisions and usurpations. It is in this apportionment that the superior advantages of the written constitution are most conspicuous. Under an unwritten constitution the legislature, whether it be monarch or parliament, is almost necessarily supreme. It makes laws for all, and all must obey them. In the rise of parliamentary authority the parliamentary body always determines for itself the limits of its authority, so that its power is bounded only by its discretion. The checks upon it, which the other departments of the government afford, are necessarily feeble, and may be disregarded. If a veto power becomes inconvenient or distasteful it will be abolished, just as in effect it has been abolished in England. Such written declarations of constitutional right as may be made from time to time are but laws, and may be changed at will. In pointed contrast to this is the legislative power under the written constitution, for that power is limited in the very grant, and every attempted law which goes beyond the grant is merely idle words, and may be treated as null by all citizens, whether in public or private station. Moreover, the grant of judicial power to another department is a grant of authority which includes the right to adjudge that to be no law which the legislature has attempted to enact beyond its jurisdiction, and the courts must protect the citizen in disregarding it. The check upon absolutism in government would thus seem to be as complete as human wisdom can make it.

IV. A good constitution should be beyond the reach of temporary excitement and popular caprice or passion. It is needed for stability and steadiness; it must yield to the thought of the people; not to the whim of the people, or the thought evolved in excitement or hot blood, but the sober second thought, which alone, if the government is to be safe, can be allowed efficiency. And here, again, the superior advantage of the written constitution is manifest. The unwritten is at the mercy of the temporary popular passion, and precedents may grow up from abuses before the sober second thought has come. The written compels delay through the steps it requires to be gone through with, and there

is thus time for temporary passions to cool and for excitements to pass away ; it begets a conservative habit of mind, which of itself is of the highest value. Changes in government are to be feared unless the benefit is certain. As Montaigne says : " All great mutations shake and disorder a State. Good does not necessarily succeed evil ; another evil may succeed, and a worse ; as it happened to Cæsar's killers, who brought the republic to such a pass that they had reason to repent their meddling with it."

V. But, as change in government is according to the order of nature, a good constitution should provide for safe growth and expansion. Here, again, it may be hastily concluded the unwritten has advantages. What growth can be better, it may be asked, than that which is going on from day to day, imperceptibly, and is finally officially and formally recognized when it is complete ? But, on the other hand, this method of change is accompanied by dangers that may threaten the very existence of government. The settlement of the question is very likely to be a settlement at the point of the sword, as it was not only when the first great charter of English liberty was won, but again when general representation in parliament was secured ; and still again when, after forty years of civil strife, it was settled by the revolution of 1688, that the rule of the king of England was not by right divine, but was conditioned on observance of the fundamental law. An appeal to arms is almost necessarily the mode of settlement when the question at issue is one that touches the foundation principles upon which the civil state is based, and especially when it strikes at the roots of ideas and prejudices which are the inheritance of ages ; so that all great questions of reform in government are likely to threaten public disorder. We have found the better way when we have agreed upon a method whereby the peaceful ballot may determine whether the time is ripe for a change, and, if so, what the change shall be, instead of leaving the question of change to the arbitrament of force. The choice of methods is thus between ballot and battle, with a reasonable certainty that the one, while it is peaceful, will truly express the actual public judgment ; while the other, besides being destructive, may prove nothing beyond the fact that the fortune of war for the time being inclines to a particular party. The written constitution thus prepares the way for growth and expansion by steps which give security against public disorder and

violence ; its provisions may be moulded to new thoughts, new aspirations, and new needs, as peacefully as the simplest law on the statute book may be modified ; perhaps with as little discussion. Whoever desires proof of the excellence of this method of constitutional development needs but to note the fact that fifteen amendments to the federal constitution have been peacefully made under the agreed forms. The proof, it may be said, is imperfect, for the last four amendments were born of the civil war. This is true ; but let it be noted that the war was not inaugurated to obtain these amendments ; it was not begun by those who might have desired them. The government was moving peacefully on under the constitution, with full observance of all its compromises ; but those with whom the recognition of slavery was the most important of its provisions saw, or thought they saw, a clear indication of steadily advancing public sentiment that in time would come to demand that this recognition, and the attendant compromises, should be stricken from the instrument. It was to escape an inevitable reform, not, as yet, imminent, but clearly foreshadowed, that the war was begun ; and the four years of bloodshed only precipitated a purification of National and State constitutions, that would otherwise have come more slowly and peacefully, and as a necessary step in national progress.

In all that has now been said by way of comparing written with unwritten constitutions, it is assumed as a postulate that sovereignty is in the political society as a whole, — in the people organized into a State, — and that the constitution is an emanation of the popular will. This is the American theory of government ; but it is more than this : it is the only theory that is rightful. Any other is the offspring of despotic ideas, and, wherever we find it accepted, it is not difficult to trace it to the fact that the government, in its origin, has been a despotism, either of a single rule or of some privileged class or classes. If we would understand why the British parliament is sovereign, rather than the British people, we have only to note how parliamentary power grew up. At the outset we see a realm governed by a king, who made laws at his absolute discretion, and claimed to govern by right divine. Popular rights under this claim were ignored, and the king, for all practical purposes, was the State. When the privileged classes contested the king's assumptions, they claimed the right of legislation, not for the great body of the people, but for them-

selves as privileged orders. The point of contention, therefore, was, whether it was the king who was sovereign, or the parliament, in which the privileged classes alone were represented. Nobody contended that the people were sovereign. The power passed in time from king to parliament, but there never was a day in the history of the country when the sovereign power was not wielded by the law-making authority. In the United States, on the other hand, there never was a time when, both as a theory and as an actual fact, there was not back of the legislature an effective sovereign power in the people.

I now lay down the proposition that, by reason of the facts already stated, the constitution of the United States is the most conservative instrument of government known to the world. Possibly one who is accustomed to look upon the United States as the chief representative of political progress, and to regard conservatism as the antagonism of progress, may see in this statement a contradiction in terms. But it is, nevertheless, true. Progress is assured through the conservative features of the constitution, in harmony with which the progressive spirit of the people acts and moves. In the fact that the constitution, though at any particular time binding inflexibly, is, nevertheless, subject to safe amendment, is to be found our security for what we have, and the possibility of anything better that time and experience may demonstrate the need for. When, as has commonly been the case with republics, the vote of an excited assembly may at once put anything into the constitution or put anything out, the republic itself is at the mercy of the fears, the passions, or the prejudices of the hour, and a dictator may come as naturally as a change in the seasons. Andrew Jackson, in one of his letters in the period of nullification, showed a true perception of the strength of the constitution when he said: "Perpetuity is stamped upon the constitution by the blood of our fathers, by those who achieved as well as those who improved our system of free government. For this purpose was the principle of amendment inserted in the constitution." But the provision for amendment was purposely made conservative. The President cannot change the constitution; Congress cannot change it; the people themselves cannot change it hastily, under the influence of temporary passions and excitements. The process is safe, but necessarily slow and deliberate. And such it ought to be. The constitution emanated from the

will of the people ; it expressed the best thought of the day ; it was agreed upon and put in force because it was found to be excellent. And surely, in changing things excellent in government, no maxim of statesmanship can be wiser than to make haste slowly. The constitution stands before the people as an emblem of strength and stability, and it begets in them a conservative habit of thought and of action which of itself is invaluable. But what, in respect to the constitution, is more conservative even than any express provisions or single feature is the fact that it is adapted to the needs and sentiments of the country, and the people are content with it. This is not only more important to the country, but is infinitely more valuable in giving confidence and security in our intercourse with other nations than great fleets or powerful armies. Matthew Arnold, after his visit among us, in his criticism of what he found here, said : " The more I saw of America, the more I found myself led to treat institutions with increased respect. Until I went to the United States I had never seen a people with institutions which seemed expressly and thoroughly suited to it ; I had not properly appreciated the benefits proceeding from this cause." To look farther for the secret of the superior merit of American institutions is needless ; they spring from national thoughts, sentiments, and impulses, and are therefore more expressly adapted to the people and their needs than are those of any other country. It is because of this that they give content and the blessings which content promotes. When institutions are thus the outgrowth of national thought and expressive of the national judgment, all right-minded people in their daily life and conduct are habitually in harmony with them. The difference between enforcing a law which is but the expression of the common thought, or, on the other hand, enforcing one which, however reasonable in itself abstractly considered, the common thought has not yet appropriated and become habituated to, is so obvious that we need not pause to comment upon it. To the citizen it is the difference between freedom and oppression.

In what is so far said I have treated the constitution as being, while it stands, the final test of law and right. But when any written instrument is to be applied to a great variety of subjects, most of which were not present to the minds of the framers in drafting it, there are likely to arise many troublesome questions in regard to its application. In the decision of such questions

under the federal constitution it has been thought by many persons that construction has unwarrantably expanded the scope of the instrument, so as to strengthen the federal government beyond what was intended. But any accession of federal strength through construction is insignificant as compared to what has come from the gradual march of events, which has made the questioned powers of government signify vastly, I might almost say infinitely, more than they did at first. The bounds of power remain the same, but the new creations that come within its compass give it an importance which those who devised it never dreamed of. When one conveys the lot upon which a palatial dwelling has been erected, he may use the same descriptive terms of metes and bounds as when the lot had value for little more than a playground for school-boys; the dwelling is a mere incident to the lot, and it goes with it in conveyance without question, and also without specification. Analogies to this may be seen in the administration of government under written constitutions. John Quincy Adams early pointed out that within the compass of the power to wage war might be found in some great emergency the power to destroy slavery; and statesmen ridiculed it until the emergency arose under which by the common consent of the loyal people the blow was struck.

The power to regulate interstate commerce when the constitution was adopted had so little immediate interest that it scarcely afforded occasion for the slightest forensic discussion. How is it to-day? The application of steam to locomotion and of electricity to correspondence has worked relatively as great a change in government as it has in the industrial world; it is the federal government, whose functions at first concerned the citizen in his private relations so remotely, which now through its control over internal and external transportation, its cheap and rapid postal service, its taxes that reach us all and reach us often, its absolute control of the currency, and the not remote probability that it may grasp with its unquestionable powers still other subjects which constitute public conveniences; it is the central government rather than the State that now seems to stand before the people as the chief representative of public order and governmental vigor, and as the possessor of general rather than of exceptional and particular powers. It may be that by and by the federal legislature, surveying the field of interstate commerce, and taking

note how State commerce encroaches upon and intermingles with it, crowding it in the same vehicles on the same roads, sharing with it in the same expenses, the rates which are imposed on the one necessarily affecting the rates that can be accepted on the other, and being handled at the same time by the same hands, under the same official control, will come to the conclusion that a separate regulation of State commerce must necessarily be, to some extent at least, and may be to a large extent, inconsistent with complete federal regulation of the commerce that is interstate. Should that conclusion be reached, the federal legislature is not unlikely to take to itself complete regulation of the whole; and, if it shall do so, it will but add another to the many illustrations already to be seen in our history, which go to show how vast is the edifice that may rightfully be erected within the bounds of single federal powers, which at first seemed of little importance.

Briefly, in conclusion, we may be permitted to bring together for contrast certain varieties of fundamental law.

Of all the constitutions which may come into existence for the government of a people, the most excellent is obviously that which is the natural outgrowth of the national life, and which, having grown and expanded as the national thought has matured, is likely at any particular time to express the prevailing sentiment regarding government, and the accepted principles of civil and political liberty.

Of all the constitutions which a people ever accepts for its organic law, the least valuable is that which it suffers to be made for it on the principle of turning the back upon the national experience, dissevering the nation's future from its past, and laying the framework of government in ideal perfection. Such a constitution may possibly in time acquire permanence, but it can never antecedently be predicated of it that the people will so far appropriate its ideas, adapt themselves to its methods, and allow it to take root in their every-day life as to convert it into an institution. In proportion as it differs from governmental thoughts and systems which are displaced by it, the probabilities are not only against its usefulness while it stands, but they are against its stability also.

Of all the constitutions which a people makes for itself, the best is that which is written with close hold on the past, but which, with foreseeing eye, prepares the way for appropriating

the lessons of a progressive future. Only such a constitution can embody the essential excellences, and can so far harmonize the conservative and the progressive principles that the one will become the complement of the other, in steadily, but cautiously and safely, moulding the instrument to greater perfection.

The purely prescriptive constitution has neither the weaknesses of the first of these, nor the supreme excellences of the other. As we see it in the best existing representative, the English constitution, it embodies the much-praised principle of direct executive responsibility to public opinion ; but this, though often taken to be peculiar to the constitution of this class, may be very readily made a feature of the written constitution, and will be so whenever the people become convinced of its desirability. Indeed, there is no feature whose excellence in the prescriptive constitution has been demonstrated by time and experience that may not be appropriated in the written constitution, or that is not likely to be appropriated by a people who deal with the subject as the American people are taught to do, at once reverently as regards the past and courageously as regards the future.

Thomas M. Cooley.

WASHINGTON, D.C.

THE LEGAL ASPECT OF THE SOUTHERN QUESTION.

IT is my purpose briefly to present certain points of law, most of them well settled, involved in discussions of the "Southern Question."

Even before the time of the present Constitution the country divided naturally into a "North" and a "South." In addition to the fact that the people of the two sections seemed to differ instinctively in their respective ideals of government, it was but natural that the manufacturing and commercial North should tend toward consolidation, and that the agricultural South should develop a love for local self-government. A trading community must have union; an agricultural need not. The conflict of opinion thus engendered between the Northern and Southern States upon matters of economy and government has constituted, in the different phases which it has from time to time assumed, the "Southern Question."

The Constitution, adopted as a compromise, is so elastic as to permit a construction by each section according to its own interest. Therefore upon nearly every question of constitutional interpretation we find the North contending for the powers of the federal government, and the South for the powers of the States.

The first fifty years and more of the legal history of the United States marks a gradual development of the powers of the national government. The Supreme Court decided in 1816 that the 25th section of the Judiciary Act, giving the court power to pass upon constitutionality of State laws, was constitutional.¹ Again, under the same section, it was held that the Supreme Court has appellate jurisdiction in causes where a State is a party.² Further, Congress asserted the power³ to regulate slavery in the Territories, and to impose conditions upon the admission of States, powers which were afterwards denied in the "Dred Scott Case."⁴ But the 8th

¹ *Martin v. Hunter's Lessee*, 1 Wheat. 304.

² *Cohens v. Virginia*, 6 Wheat. 264.

³ In the Missouri Compromise, 1820.

⁴ *Dred Scott v. Sandford*, 19 How. 393 (1856). •

section of the Constitution, enumerating the powers of Congress, and especially the first clause, conferring the power "to levy and collect taxes . . . and provide for the . . . general welfare of the United States," was, together with the 18th clause, giving the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," the great battle-ground between champions of the different sections.

Representative controversies relating to this section of the Constitution are those concerning the power of Congress to levy duties for protection, as well as for revenue, and the power to establish a national bank. The tariff question led to the extreme stand taken by South Carolina, in 1829 and in 1832, that a State could nullify an act of Congress which it deems unconstitutional, thus following out the idea contained in the Virginia and Kentucky resolutions of 1798, 99. But the power of Congress in this regard was, nevertheless, asserted, and it was maintained by the President. The bank controversy terminated also in favor of the federal powers. Not only was it decided that Congress could create a bank, but it was also held that a State could not impose any burdens upon the bank by way of taxation or otherwise.¹

With the development of the powers of the United States came limitations upon the powers of the States. For instance, they cannot annul a judgment of a federal court;² nor grant monopolies which interfere with the powers of Congress;³ nor rescind their own grants or contracts.⁴ Blow after blow was given to the cherished theories of the South, every stroke tending to establish that, within certain limits, the government of the United States has all the attributes of absolute sovereignty.

The growing importance of the slavery question, however, finally led the South to the view that such sovereignty as the United States possessed was conditional upon the consent of the States. Now, the Constitution divides sovereign powers between the Federal and the State governments. Those belonging to the latter constitute the true "State rights." Yet, although State

¹ *McCulloch v. Md.*, 4 Wheat. 316 (1819); *Osborn v. Bank of U. S.*, 9 Wheat. 736 (1824).

² *United States v. Peters*, 5 Cranch, 115 (1809).

³ *Gibbons v. Ogden*, 9 Wheat, 1 (1824).

⁴ *Fletcher v. Peck*, 6 Cranch, 87 (1810); *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819).

rights and National rights ought to be supreme within their respective limits, it was claimed that the former included the power to destroy the latter. This contention, first expressed in the Virginia and Kentucky resolutions and in the nullification ordinances of South Carolina, became the right of secession in 1861. It was this impracticable phase of "State rights" which was put at rest by the war. The tendency has since been to define more and more exactly the true line of demarcation between State and National sovereignty.

New questions required such a line to be carefully drawn. Under the recently adopted amendments to the Constitution (the XIIIth, XIVth, and XVth) there was danger that the North, in its desire to wipe out the injustice of years, would go altogether too far; while, on the other hand, it was likely that the South, if left to itself, would be slow to recognize that the days of slavery were over. The new *régime* gave to the negro civil and political rights equal to those of other citizens. By "political rights" is meant those which relate to the participation of the individual in the making of the laws. The term "civil rights" properly includes all legal rights not political; but with reference to discussions of the Southern question it has a much narrower meaning. What is meant seems to be those rights which affect the social status of the negro. Other civil rights, however fundamental, such as the right to acquire and hold property, the right to appear in court as witness or party, have occasioned little controversy.¹

How far is the social condition of the negro under federal protection? All persons have an equal right to the privileges of public schools. The XIVth Amendment forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." This clearly would prevent a State from excluding

¹ The Civil Rights Act of April 9, 1866 (14 Stat. at Large, c. 31) reenacted, with some modifications in the Enforcement Act of 1870 (§§ 16-19), declared that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to the same burdens and penalties, and none other; and provides for the punishment of any person who, under color of any law, statute, ordinance, regulation, or custom, shall deprive any inhabitant of a State or Territory of such rights. It was also declared that "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by the white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property." See Rev. St., §§ 1977, 1978.

colored children from the public schools. If a law is passed providing for public education, no clause can be inserted which will discriminate against one race, so that it will not enjoy equal advantages with others.¹ But a State may establish separate schools for the whites and blacks, provided such schools offer substantially the same advantages.² In like manner laws prohibiting the inter-marriage of the white and black races are not within the XIVth Amendment, because they bear equally upon both.³

But the social equality sought to be established between the two races is far more likely to be disturbed by individuals rather than by States. May the federal government compel carriers, innkeepers, proprietors of places of amusement, and the like, to serve all persons without discrimination of color?⁴ The famous "Civil Rights Cases,"⁵ decided in 1883, held it could not. Against strong opposition on constitutional grounds, the "Act to protect all citizens in their civil rights" had been passed March 1, 1875, providing "that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." The act sought, therefore, to operate directly upon individuals, and the question was whether power was given to Congress by the

¹ Ward v. Flood, 48 Cal. 36.

² Bertonneau v. Directors, 3 Woods, 177; Cory v. Carter, 48 Ind. 327; State v. McCann, 21 Oh. St. 198; People v. Easton, 13 Abb. Pr. N. S. 159; County Court v. Robinson, 27 Ark. 116; State v. Duffy, 7 Nev. 342; Cooley, Torts, 287, 288.

In Board of Education v. Tinnon, 26 Kan. 1, the right to establish separate schools was denied, on the ground that, unless a State can provide separate schools for each nationality, it cannot for any. In Ward v. Flood, 48 Cal. 36, it was held that, during the erection of buildings provided for in an act establishing colored schools, colored children must be admitted to the white schools. See on this subject a note by J. C. Harper, 10 Fed. Rep. 736.

Mandamus appears to be the proper legal remedy to enforce admission to schools. Cases *supra*; and High, Ex. Leg. Rem., § 332.

³ *Ex parte* Kinney, 3 Hughes, 9; *Ex parte* Francois, 3 Woods, 367; *Ex parte* Hobbs and Johnson, 1 Woods, 537. See also Green v. State, 58 Ala. 190.

⁴ Of course such public servants are within State control.

⁵ 109 U. S. 3.

XIIIth and XIVth¹ Amendments to prevent private persons from making the discriminations mentioned. Bradley, J., speaking for the court, said that clearly no power could be derived from the XIVth Amendment. That amendment provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." "This," he said, "does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the agreement. . . . Such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect." Speaking of the operation of the XIIIth Amendment, which abolished slavery, he said that this amendment, as distinguished from the XIVth, was "not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." Therefore, neither an individual nor a State can impose slavery, or a badge of slavery, upon any one; but it cannot be said that the discriminations in the Civil Rights Act constitute either slavery or badges of slavery.

Thus it appears that the United States can do little to preserve the social equality of the negro from individual attack. Yet it should be remembered that Congress, in the exercise of some express power, may incidentally reach this matter. Under the power to regulate commerce, for instance, carriers may be required to afford equal accommodations to whites and blacks.² But aside from such instances it seems that, in general, no social discrimination whatever against the negro race, not amounting to slavery or a badge of slavery, if made by individuals, can constitutionally be reached by federal legislation.

Of course, such discrimination is often prohibited by the States themselves. Common carriers, innkeepers, and proprietors of

¹ The Civil Rights Act is not affected by the XVth Amendment, which concerns only the right to vote.

² Cooley, Torts, 283. See also *Hall v. De Cuir*, 95 U. S. 485.

places of public amusement are under a duty to serve the whole public alike, and it is clearly within the power of a State to enforce that duty. But upon the whole it must be said that legislation looking to the establishment of social equality between two races is not generally successful, and is not to be encouraged. Such matters had better be left to themselves; and it is not likely that the United States will attempt anything further in this direction, for only the excited period following the war can explain the faith which people had in the power of government to establish harmony and good-fellowship between the races, and the eagerness with which they followed the lead of men like Sumner, who, with the highest motives of philanthropy, attempted the impossible, and, it must be added, the unconstitutional.

There is, however, a field within which federal legislation is both constitutional and, to some degree, practicable. Citizens of the United States and of the States have certain political rights. It is claimed by many that these rights are denied to the negro in the Southern States; and, from the point of view of the lawyer, the "Southern Question" to-day practically means, What are these rights, and how are they to be protected?

We must first decide what rights are, from their nature, within the protection of the States, and what within the protection of the United States. The XIVth Amendment says that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; and Congress is given power to enforce this prohibition by appropriate legislation. What are the privileges and immunities of citizens of the United States? Do they comprise all rights enjoyed by citizens, whether coming from the United States or not, or only rights derived from the United States? Very likely the XIVth Amendment intended the former; but the Supreme Court, when the question arose in the "Slaughter-House Cases," in 1872,¹ perceiving that thereby the jurisdiction of the United States would be enormously extended, shrewdly determined that only the latter were meant. The attributes of citizenship of the United States, as distinguished from citizenship of the States, arise, it was said, from the nature and essential character of the general government, and are, therefore, very limited indeed; while, on the other hand, the attributes of State citizenship are all those general and fundamental rights

¹ 16 Wall. 36.

secured by our system of law, which have not been excepted by the federal Constitution.

Now, by far the most important political right of a man in this country is the right to vote. But this right is derived from the States, not from the United States. The States fix the qualifications of voters. The United States confers suffrage upon no one, imposes no qualifications of its own. There is no occasion for a body of federal electors, except for choice of representatives, senators, President, and Vice-President. The Constitution¹ provides that the electors in each State for members of the House of Representatives shall have the qualifications requisite for electors of the most numerous branch of the State legislature. Senators are to be elected by the State legislatures.² The President and Vice-President are chosen by electors, appointed in such manner as the legislature of each State may direct.³ Only in the last instance does the United States provide for the creation of an electoral body, and perhaps, strictly speaking, this body is composed of voters of the United States; but for the election of representatives and senators electoral bodies already in existence are employed.⁴ Nor can it be said that the XVth Amendment confers the right of suffrage upon any one. It has merely given to citizens of the United States the constitutional right to "exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. . . . The right to vote in the States comes from the States; but the exemption from the prohibited discrimination comes from the United States,"⁵ and this exemption applies to all electors, whether State or National. It follows, therefore, that Congress may, as to the right to vote, prevent all discriminations by the States on account of race, color, or previous condition of servitude. Further than this Congress cannot interfere with State elections, unless the State, by withholding the equal protection of its general laws, fails to secure the right of suffrage to all voters alike.

Congress has, however, special powers with reference to federal

¹ Art. I, sec. 2.

² Art. I, sec. 3.

³ Art. II, sec. 1.

⁴ *United States v. Reese*, 2 Otto, 214 (1875).

⁵ *United States v. Cruikshank*, 2 Otto, 542 (1875). But it should be noticed that incidentally the United States may confer the right of suffrage "by compelling the States to choose between excluding white men from the polls and admitting negroes, and striking the word 'white' from the laws by which the right of voting was regulated." 1 Hare, *Am. Const. Law*, 524; *Ex parte Yarbrough*, 110 U. S. 651, 665.

elections. The Constitution¹ says that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators." As a matter of speculation it may be said that Congress would probably have had *some* power to control federal elections without such express provision; for, in the event of a State's refusing to provide for an election, it is not likely that the resources of the Constitution would fail to preserve the government.

In early days it was thought that the power could be exercised only when necessity demanded. Hamilton apparently saw merely a reservation of a right to the national government "to interpose whenever extraordinary circumstances might render that interposition necessary to its safety."² At all events, it was thought that the power would not be exerted unless occasion absolutely required.³ It has since been settled, however, that congressional action is not thus limited. In 1842 an election law was passed providing for the election of representatives by districts, but, owing to the great opposition of the States and an adverse report by Stephen A. Douglas as to its constitutionality, it remained a dead letter till 1862, when it was reënacted.⁴ In 1872 came the act fixing the time for election of representatives on the Tuesday after the first Monday in November.⁵ It is hard to see why Congress may not at will prescribe the times, places, and manner of holding federal elections.

Some doubt may arise as to what is a regulation of the "manner" of holding an election. "Times" and "places" are precise terms; but "manner" is necessarily vague. Is it part of the "manner" that an election shall be orderly, that there shall be no intimidation, bribery, prevention from voting, or violence of any kind? Without attempting to be very precise, one can say that Congress may make any provision that can justly be said

¹ Art. I., sec. 4.

² *Federalist*, No. 59.

³ 1 Story Comm. (3d ed.), § 816. See also the remarks of Senator Whyte on the Edmunds Resolutions, 8 Cong. Rec. 998 (1879). The State of North Carolina refused to ratify the Constitution unless the power of Congress was expressly limited. Seven out of thirteen States protested against the clause.

⁴ Rev. St., § 23.

⁵ Rev. St., § 25.

to contribute directly to the accuracy and fairness of the result.¹

What remedies has Congress afforded for infringements of the right to vote? In the first place, the President has been given power to call out the militia, whenever he thinks necessary, to suppress any combination or conspiracy or violence which deprives any person or class of persons of the "rights, privileges, and immunities," or of the "equal protection of the laws," guaranteed by the Constitution, if the State is unable or refuses to give adequate protection.² This act is evidently constructed with special reference to the XIVth Amendment, which prohibits the States from denying to any one the equal protection of the laws. How does it affect the right to vote? We have seen that suffrage may be conferred by the States upon whomsoever they will, provided that they do not discriminate on account of race, color, or previous condition. The effect of the XIVth Amendment is to secure to the body of voters the equal protection of the laws by which they may enjoy the right bestowed upon them. Although the act in question provides an extreme remedy for all State action contrary to the XIVth Amendment, it was probably designed with special reference to the right to vote.

The statute declares that a failure or refusal by the State to secure the equal protection of the laws amounts to a positive denial. If that theory is correct, the act is constitutional; but, if it is not, the act attempts to cover something more than violations by a State of the XIVth Amendment, and it seems that the discrimination taken in the Civil Rights Cases applies, viz., that since the prohibition in the XIVth Amendment rests only upon

¹ *Ex parte Yarbrough*, 110 U. S. 651; McCrary on "Our Election Laws," 128 N. A. Rev. 449 (1879). Further legislation in control of elections has been mooted from time to time. See the debate on the Edmunds Resolutions in 1879, 8 Cong. Rec. 839-848, 885-893, 954-962, 997-1030.

In this connection may be noticed the bill introduced by Senator Sherman, Jan. 8, 1889, to regulate "the times, places, and manner of holding elections for representatives in Congress." It provides for a "Board of State Canvassers" in each State, and an "Electoral Board" for each congressional district. These federal officers are to register and count votes, declare results, and correct irregularities in elections for representatives to Congress. The bill also provides that these boards may conduct elections for presidential electors in the same way at the national expense, if the State desires. The consent of the State must be given, because the choice of presidential electors is strictly a State affair. The bill is probably constitutional, and is an example of how far Congress may go in regulating the manner of elections.

² Act Apr. 20, 1871, 17 Stat. at Large, c. 22, § 3; Rev. St., § 5299.

the States, the federal government can interfere only when the States deny the rights guaranteed by the amendment. But it is not worth while to go further into this matter, since the power to employ militia is of little present importance.

Let us look for a moment at further attempted remedies. May 31, 1870, an "Enforcement Act" was passed,¹ the first section of which declared all citizens of the United States who are otherwise qualified to vote at any municipal, State, or federal election, shall be allowed to vote at such elections without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. The succeeding sections provided a criminal remedy for the following offences, besides, in most instances, a civil remedy to the party aggrieved. When a person or officer denies under authority of the State to any one, on account of race, color, or previous condition of servitude, an equal opportunity with others to do an act required as a qualification for the right to vote (sect. 2); when an officer wrongfully refuses, as "aforesaid," to count the vote of a person making affidavit that he was prevented under color of State authority from doing the act "aforesaid" (sect. 3); preventing by bribery, threats, or intimidation, or combining to prevent, the doing of the act "aforesaid" (sect. 4); hindering or attempting to hinder, by bribery or threats, any person from exercising the rights of suffrage guaranteed by the XVth Amendment (sect. 5); combinations to violate the act, or to prevent any person from enjoying the rights and privileges secured by the Constitution of the United States, or to injure any person for having enjoyed the same (sect. 6); illegal voting, bribery, or intimidation of voter or officer (sect. 19); illegal registering, and illegal refusal to perform any duties relating to such registration in elections for representatives (sect. 20).²

Any person deprived of an office, except that of elector, and of representative to Congress or State legislature, may recover it in the United States Circuit or District Courts (sect. 23).

The validity of certain sections of the act was tested in a

¹ 16 Stat. at Large, c. 114. The President has power to enforce the provisions of the act with the army and navy of the United States, and with the militia.

² The design of this act is carried somewhat farther in St. Apr. 20, 1871, c. 22, § 1. By the same act certain combinations are made crimes.

number of cases, chief among which are *United States v. Reese*¹ and *United States v. Cruikshank*.² In the first case an indictment was found under the 3d and 4th sections against inspectors of a municipal election in Kentucky, for refusing to receive and count the vote of a United States citizen of African descent. It was held that these sections were unconstitutional, because they were not expressly limited to operate upon discriminations on account of race, color, or previous condition of servitude; for the only right given by the United States, with reference to voting, is the right to exemption from such discrimination by a State. Practically the same reason operated to make an indictment defective in *United States v. Cruikshank*. There, an indictment was found under the 6th section for intent (among other things) to prevent citizens from voting at a State election, and to put certain persons in fear of great bodily harm because they had previously voted at a State election. No interference with a right under federal protection was described; and even if an interference on account of color might be shown, it was not charged that the offence was committed under the authority of the State.³

It has been said that infringements of the right to vote must be by a State, in order to come within the XIVth and XVth Amendments. In federal elections, as has been seen, wrongful acts of individuals may be prevented by Congress, because of the general power over such elections given by art. I., sect. 4, of the Constitution. But what is meant by "State" in the XIVth and XVth Amendments? Are the doings of a State officer or the decisions of the courts the acts of the States? Or, is the prohibition directed solely against legislation? It would seem that the view stated in the "Civil Rights Cases" is the correct one. Speaking of civil rights in general, the court say that "civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful act of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings."⁴ Acts done under color of State authority are, therefore,

¹ 2 Otto, 214 (1875).

² 2 Otto, 542 (1875).

³ For this reason, the 5th section also of the Enforcement Act, protecting the exercise of the rights of suffrage guaranteed by the XVth Amendment, seems unconstitutional, because it is aimed at individuals, not States.

⁴ 109 U. S. 3, 17.

acts of a State. This puts a wide, but perhaps a not too wide, construction upon the amendments.

Although the constitutional prohibitions rest only upon a State, yet they may be enforced by the punishment of any individual who acts under color of State authority.

Senator Sherman, in the debate in 1870, on the passage of the Enforcement Act, probably stated the case correctly when he said, "If the offender, who may be a loafer, the meanest man in the streets, covers himself under the protection or color of a law or regulation or constitution of a State, he may be punished for doing it."¹

But suppose the State is unable or neglects to protect the civil rights of citizens; shall that be deemed a denial of those rights? It was so declared in the Militia Act,² before cited. Perhaps it is not too great a stretch to call this a denial, but it is very doubtful. Another view which extends still farther the scope of the amendment is that "State" means all those who act as agents of the State, whether they keep within their powers or exceed them.³ This is not the accepted view.

It is not necessary for Congress to wait for legislative or other acts by a State obnoxious to the constitution; but provision may be made for them in advance.⁴

Several other statutes must be mentioned. They relate mainly to certain conspiracies. Conspiring or going in disguise on the highway or on the premises of another, under color of State authority, for the purpose of depriving any one of the equal protection of the laws or of interfering with the right to advocate or vote for President, Vice-President, or representative, renders the offender liable to the party injured in a civil action.⁵ Under principles already stated, this statute seems constitutionally sound. Not as much can be said of the statute⁶ which makes it criminal to conspire or go in disguise as above for the purpose of depriving any one of the equal protection of the laws, or of equal privileges and immunities under the laws, or of preventing the State authori-

¹ Cong. Globe, 1869-70, p. 3663.

² Act Apr. 20, 1871, c. 22, § 3; Rev. St., § 5299.

³ United States v. Reese, 2 Otto, 214, 251, 252, per Hunt, J.

⁴ Civil Rights Cases, 109 U. S. 3, 13; *Ex parte Virginia*, 100 U. S. 339; *Virginia v. Rives*, 100 U. S. 313, 318; *United States v. Cruikshank*, 92 U. S. 542.

⁵ Rev. St., § 1980.

⁶ Rev. St., § 5519.

ties from securing equal protection to all, whether such acts are under color of State authority or not. At any rate, it cannot be supported under the XIVth Amendment, which does not apply to individuals.¹ No objection, however, can be taken to the further enactment,² that conspiring to prevent any legal voter from voting for elector or member of Congress shall be criminal, because federal elections are subject to congressional control under the power to regulate the manner of holding them.

The remaining legislation affecting the right to vote consists chiefly of provisions for supervisors and employment of marshals at federal elections.³

The conclusions with regard to suffrage may be summed up as follows :—

1. *In General.*—The right to vote is conferred by the States, not by the United States. Hence a State may bestow the right upon any class to the exclusion of others, provided that no discrimination shall be made on account of race, color, or previous condition of servitude ; but if suffrage is not conferred upon any class, then the State representation is to be proportionally cut down according to the provision in the XIVth Amendment.

2. *State Elections.*—Congress may interfere by appropriate corrective legislation whenever a State denies to any one the right to vote on account of race, color, or previous condition of servitude.

¹ 1 Hare, Am. Const. Law, 526.

² Rev. St., § 5520.

³ Rev. St., §§ 2011-2031. In cities and towns of over 20,000 inhabitants, two citizens may apply to the circuit judge for the appointment of two supervisors of different parties, who shall attend at times of registration and voting for election of representatives to Congress, examine and verify lists of voters, make challenges, scrutinize and count ballots, inspect methods of voting, and forward to the chief supervisor, appointed by the court, all certificates and returns required by him. The chief supervisor may take testimony in regard to any interference with the performance of their duties, to be submitted to the clerk of the House of Representatives.

Upon similar application to the marshals of the district, deputies will be appointed, who, together with the marshals, shall protect the supervisors and preserve order. Both they and the supervisors may arrest for all offences against the laws of the United States committed in their view, or in the view of the supervisors.

Besides these provisions for cities, ten citizens in any county or parish may apply to the circuit judge for the appointment of supervisors, who shall have, however, no authority to do more than be in the immediate presence of the officers holding the election, and to witness all proceedings, but not to make arrests.

The employment of marshals and deputies to preserve order at the elections in large cities has not been wholly a success. The charge is freely made that they work in the interest of party.

Moreover, Congress may thus interfere when a State denies to any person the equal protection of the laws. This means, so far as the right to vote is concerned, that, under color of State authority, no restrictions, not bearing equally upon all, shall be imposed upon the exercise of the suffrage which the State has bestowed.

A denial by a "State" is a denial supported by State authority in the shape of laws, customs, or judicial or executive proceedings; and possibly inability or neglect to protect the rights guaranteed by the Constitution amounts to a denial of them.

There can be no federal interference for any other purpose, such as to prevent fraud, intimidation, or violence by individuals.

3. *Federal Elections.*—Congress may interfere as in State elections, and also, under art. I., sect. 4, of the Constitution, may prevent and punish all wrongful acts, by whomsoever committed, whenever such a course can justly be said to contribute to accuracy and fairness.

Other political rights, besides the right to vote may be guarded by the United States. The right to hold office is protected by statute, making it both a civil¹ and a criminal² offence to conspire to prevent, by force, intimidation, or threat, any person from holding or discharging the duties of an office under the United States.

The fourth section of the Civil Rights Act of 1875 prohibited disqualification from jury service because of race, color, or previous condition of servitude. This has been held constitutional,³ because corrective of State legislation making a discrimination obnoxious to the XIVth Amendment. The right to assemble for the purpose of petitioning Congress for redress of grievances, or for any other purpose connected with the power or the duties of the national government, is an attribute of national citizenship, and as such to be protected by the United States.⁴ But the right to assemble merely is not within federal protection. The same is true of the right to bear arms for a lawful purpose.⁵

Closely connected with the subject of the security of suffrage in the South is the matter of contested elections. How can the result of an election which has been conducted in defiance of the law be impeached?

¹ Rev. St. 1980.

² Rev. St. 5518.

³ *Ex parte Virginia*, 100 U. S. 339.

⁴ *United States v. Cruikshank*, 2 Otto, 542.

⁵ *Ib.*

The remedies are usually statutory, but a contest as to the seat of a member of a legislature is generally controlled by the rules and orders of the legislature itself. At common law the remedy is by *quo warranto*, filed on behalf of the State by the public prosecutor, to inquire into and correct the alleged usurpation of a public office. Originally the proceeding was criminal, but it is now regarded as practically civil.¹

The two houses of Congress, however, are the judges of the qualifications of their own members.² No particular rule seems to have been adopted by the Senate, but each case has been investigated in the manner which appeared best suited to it. The practice is to refer to a committee.³ Few questions of fact arise in senatorial contests, because senators are chosen by State legislatures, which decide for themselves the qualifications of their members, into whose election the United States has no power to inquire.

The House of Representatives for a long time had no settled method of contesting elections. A few early laws were passed and expired, and from 1804 to 1850 there was practically no law on the subject. Procedure was in great confusion.⁴ It should be said, however, that the matter is hardly a subject for legislation, because Congress is not bound by any law it may pass. But, in 1851, legislation was again attempted, and various acts have since been passed, which partially provide a procedure in cases of contested elections. Notice must be given to the seated member, by the contestant, within thirty days after the election has been determined by the proper authority, specifying particularly the grounds of the contest.⁵ Thirty days are then given for an answer to be served on the contestant.⁶ Ninety days⁷ are given to the parties for the taking of testimony before certain prescribed officers, which, after it is taken, is sealed up and sent to the

¹ McCrary, Elections (3d ed.), §§ 389, 390.

² Const., Art. I., sec. 5.

³ "The Mode of Procedure in Cases of Contested Elections," by H. L. Dawes, 2 Am. J. Soc. Sci. 56, 58.

⁴ The New Jersey contested election in 1839 almost produced a state of anarchy in the House.

⁵ Rev. St., § 105.

⁶ Rev. St., § 106.

⁷ The contestant has forty, the seated member forty, and the contestant the remaining ten for rebuttal.

clerk of the House, who decides, on failure of the parties to come to an agreement, how much shall be printed.¹ Briefs are then filed,² and the matter is referred to a committee, who make a report, which is either adopted or rejected by the House. Thus the case is disposed of; but it is needless to say that the vote on the report is frequently a party one.

The principal grounds for setting aside an election are intimidation and fraud. If the true result of an election has been changed, or cannot be ascertained with certainty from the returns, because of violence or intimidation, the election should be set aside. Whether the contestant can be counted in is a difficult question. McCrary, in his work on elections,³ says: "It must, however, in the nature of things, be a rare case in which the votes of persons prevented from voting by violence or intimidation can be counted for one or the other candidate, as if actually cast. In order that a vote not cast shall be counted as if cast, it must appear that a legal voter offered to vote a particular ballot, and that he was prevented from doing so by fraud, violence, or an erroneous ruling of the election officers. Just what is to be understood by offering to vote, is not, perhaps, perfectly well settled. If a voter approaches, or attempts to approach, the polls, for the purpose of depositing his ballot, and is driven away, or, by violence, intimidation, or threats, prevented from the actual presentation of his ballot to the proper officer, and if he used proper diligence in endeavoring to reach the polls and deposit his ballot, and was not intimidated without sufficient reason, the better opinion seems to be that his vote may be counted. But, of course, voters who do not present themselves at the polls and offer their ballots, or who do not attempt to go to the polls at all, or, attempting, fail, without reasonable cause, cannot, in any case, ask that their vote be counted."⁴

The employment of soldiers to keep order at the polls is always hazardous, because, if their presence causes a number of voters, sufficient to affect the result, or to render it doubtful, to abstain from voting from reasonable motives, the election ought to be set aside, although there is no actual violence.⁵

An election should be treated as a whole, in passing upon the

¹ Rev. St., §§ 106-127.

² Acts 2d Sess. 49th Cong. 445.

³ McCrary, Elections (3d ed.), § 523.

⁴ *Newcum v. Kirtley*, 13 B. Monroe, 515.

⁵ *Giddings v. Clark*, 42d Congress.

question whether it has been fair and free ; that is, do the returns give the true ultimate result, although certain precincts, or voting places, are necessarily thrown out of the count ?¹ The question always is, has the great body of electors had a fair opportunity to express their choice ? This same criterion applies to fraud as well as to intimidation and violence.

One further matter presents itself,—one that may assume some importance in the future. It has been said that a State may confer the right of suffrage upon whom it pleases, provided that no discrimination is made on account of race, color, or previous condition of servitude. “But when the right to vote at any election for the choice of electors for President and Vice-President, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crimes, the basis of representation shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens, twenty-one years of age, in each State.”² How far can a State under this amendment impose qualifications upon voters without cutting down its representation ? Suppose, for instance, that some of the Southern States should require that voters be able to read and write,—a requirement which would disfranchise a large proportion of negroes and many whites.³ At first blush it seems that the representation must necessarily be reduced, since the words of the amendment, “denied or in any way abridged,” appear very comprehensive. But it has been pointed out⁴ that qualifications are made in many States which prevent a large number of persons from voting, and yet the representation is not consequently diminished. In New York at least three per cent. of the male population above twenty-three years of age is prevented from voting by the laws of residence and registration. In Massachusetts the educational qualification reduces the voting population one-sixteenth. It is clear that the universal understanding in this country does not apply the amendment to

¹ McCrary, *Elections* (3d ed.), § 529.

² Const. XIVth Am., sec. 2; Rev. St., § 22.

³ Amendments to the State constitutions have recently been proposed in the legislatures of Alabama and South Carolina, providing for an educational test, but, it must be admitted, with little hope of success. See 47 Nat. 511.

⁴ 47 Nat. 468.

such cases as these. Ought any different rule to be invoked in such extreme cases as South Carolina or Alabama, where an educational test like that in Massachusetts would reduce the voters about one-half? It is difficult to say what view would prevail, since Congress, having the power to apportion representation among the States and to judge of the election and qualifications of its members, could construe the amendment as it pleased; and such construction probably could in no way be revised by the Supreme Court. But we can judge somewhat how the Supreme Court would treat the matter, if it ever could be in issue there, from the interpretation given to analogous clauses of the Constitution. In section 1 of the XIVth Amendment, a State is forbidden to "deprive any person of life, liberty, or property without due process of law." With regard to property, "deprive" is construed to mean an actual taking away of some property right. The State may regulate the use of property, and not come within the prohibition.¹ In the same way the clause forbidding a State to impair the obligation of contracts² is interpreted that there must be an actual taking away of a contract right or of a substantial remedy thereunder.³ A law which decreases the value of the contract right does not necessarily come within the clause. Perhaps a good way to express the rule is to say that it is a subtraction of an integral part of the property or contract right which is prohibited. The best analogy of all, however, is found in the interpretation of the clause that no State shall pass an *ex post facto* law,⁴ made in the "Test Oath Cases,"⁵ which involved the constitutionality of statutes requiring a person to take an oath that he had always been loyal to the United States, as a qualification for holding office or pursuing certain callings. If the oath was intended as a prohibition from certain offices or professions, and designed to punish past offences, then it was within the clause for-

¹ Compare the cases where the police power has been exercised, even to the extent of practically depriving the owner of all, or nearly all, the benefits of ownership. *Mugler v. Kansas*, 123 U. S. 623 (1882). See also the *Oleomargarine Cases*. *People v. Marx*, 99 N. Y. 377 (1885); *Powell v. Pa.*, 127 U. S. 678 (1887); *State v. Addington*, 12 Mo. App. (1882).

² Const., Art. I., sec. 10.

³ *Fletcher v. Peck*, 6 Cranch, 115; *Calder v. Bull*, 3 Dall. 386; *Bronson v. Kinzie*, 1 How. 311.

⁴ Const., Art. I., sec. 10.

⁵ *Ex parte Garland*, 4 Wall. 333; *Cummings v. Mo.*, 4 Wall. 277; *Peerce v. Carskadon*, 16 Wall. 234; *Kring v. Mo.*, 107 U. S. 221; *Murphy v. Ramsey*, 114 U. S. 40-44.

bidding *ex post facto* laws; but if it was designed as a real qualification, then it was constitutional. In most of the cases the court decided that the oath was not a real qualification.

Gathering what we can from these analogies, we infer that the word "denied" means an absolute refusal to confer the right of suffrage upon certain persons, and that "abridged" means a partial denial. Suppose a State refuses to let any one-legged men vote; that would be a denial. And suppose the State refuses to let one-legged men vote in all elections; that would be an abridgment. Now, a requirement which an average person could meet, if he chose to, would amount to neither a denial nor an abridgment. Indeed, we may say, in general, that any qualification on the right to vote which can be acquired by an exercise of average ability, is permissible without entailing a loss of representation. A qualification which goes farther than this must necessarily, to some extent, amount to a denial or an abridgment of the right to vote. The question should be as it was in the "Test Oath Cases," — Is this requirement really a prohibition or a qualification?

Whatever argument can be drawn from the intention of the country in adopting the XIVth Amendment favors this view. The desire was to prevent discriminations against the negro race. Now, it is a fact patent to every one that an educational qualification would not operate solely upon the negro. The number of white illiterates in some of the Southern States is very great.

In conclusion, I may say that my attempt has been merely to state, in a collected form, the law bearing upon the "Southern Question." It should be remarked, however, that although it may enter much into public discussion, the law will probably become a less and less distinctive factor in the adjustment of Southern troubles, which will be left to work themselves out on social and economic lines. Nevertheless, so long as legislative interference is mooted, it is necessary to have some knowledge of what may be done under the laws of the Union and the States.

E. Irving Smith.

ASSUMPSIT FOR USE AND OCCUPATION.

IN an essay on the History of Assumpsit in the current volume of the REVIEW it is stated (p. 65) that *Indebitatus Assumpsit* for use and occupation was not allowed upon a quasi-contract, for special reasons connected with the nature of rent. To set forth briefly these reasons is the object of this *excursus*.

It is instructive to compare a lease for years, reserving a rent, with a sale of goods. In both cases, debt was originally the exclusive action for the recovery of the amount due. In neither case was the duty to pay conceived of as arising from a contract in the modern sense of the term. Debt for goods sold was a grant. Debt for rent was a reservation. About the middle of the sixteenth century *Assumpsit* was allowed upon an express promise to pay a precedent debt for goods sold; and in 1602 it was decided by Slade's case that the buyer's words of agreement, which had before operated only as a grant, imported also a promise, so that the seller might, without more, sue in Debt or *Assumpsit*, at his option.¹

Neither of these steps was taken by the courts in the case of rent. There is but one reported case of a successful *Indebitatus Assumpsit* for rent before the Statute 11 Geo. II. c. 19, § 14; and in that case the reporter adds: "Note, there was not any exception taken, that the *assumpsit* is to pay a sum for rent; which is a real and special duty, as strong as upon a specialty; and in such case this action lies not, without some other special cause of promise."² This note is confirmed by several cases in which the plaintiff failed upon such a count as well when there was subsequent express promise³ as where there was no such promise.⁴

The chief motive for making *Assumpsit* concurrent with Debt for goods sold was the desire to evade the defendant's wager of law. This motive was wanting in the case of rent, for in debt for

¹ *Supra*, 54-56.

² *Slack v. Bowsal* (B. R. 1623), Cro. Jac. 668.

³ *Green v. Harrington* (C. B. 1619), 1 Roll. Ab. 8, pl. 5, Hob. 24, Hutt. 34, Brownl. 14, s. c.; *Munday v. Baily* (B. R. 1647), Al. 29, Anon. Sty. 53, s. c.; *Ayre v. Sils* (B. R. 1648), Sty. 131; *Shuttleworth v. Garrett* (B. R. 1688), Comb. 151, per Holt, C. J.

⁴ *Reade v. Johnson* (C. B. 1591), Cro. El. 242, 1 Leon. 155, s. c.; *Neck v. Gubb* (B. R. 1617), 1 Vin. Ab. 271, pl. 1, 2; *Brett v. Read* (B. R. 1634), Cro. Car. 343, W. Jones, 329, s. c.

rent wager of law was not permitted.¹ Again, although *Assumpsit* was the only remedy against the executor of a buyer or borrower, the executor of a lessee was chargeable in debt. These two facts seem amply to explain the refusal of the courts to allow an *Indebitatus Assumpsit* for rent.

But although the landlord was not permitted to proceed upon an *Indebitatus Assumpsit*, he acquired, after a time, the right to sue in certain cases, in special *assumpsit*, as well as in debt. This innovation originated in the King's Bench, which, having no jurisdiction by original writ in cases of debt, was naturally inclined to extend the scope of trespass on the case, of which *Assumpsit* was a branch. At first this court attempted to justify itself by construing certain agreements as not creating a rent. For example, in *Symcock v. Payn*,² the plaintiff declared that "in consideration that the plaintiff had let to the defendant certain land, the defendant promised to pay *pro firma prædicta terræ* at the year's end, £20." "All the court (*absente* Popham) held that the action was maintainable; for it is not a rent, but a sum in gross; for which he making a promise to pay it in consideration of the lease the action lies."³ This judgment was reversed in the Exchequer Chamber in accordance with earlier and later cases in the Common Bench.⁴

In the reign of Charles I. the rule was established in the King's Bench that *Assumpsit* would lie concurrently with Debt, if, at the time of the lease, the lessee expressly promised to pay the rent. *Acton v. Symonds*⁵ (1634) was the decisive case. The count was upon the defendant's promise to pay the rent in consideration that the plaintiff would demise a house to him for three years at a rent of £25 per annum. The court (except Croke, J.) agreed that if a lease for years be made rendering rent, an action on the case lies not upon the contract, as it would upon a personal contract for sale of a horse or other goods, but where there is an *assumpsit* in fact, besides the contract on the lease, an action on this *assumpsit* is maintainable. In the report in Rolle's Abridgment it is said: "The action lay, because it appeared that it was intended by the parties that a lease should be made and a rent reserved, and for

¹ *Reade v. Johnson*, 1 Leon. 155; *London v. Wood*, 12 Mod. 669, 681.

² Cro. El. 756, Winch. 15, s. c. cited (1621).

³ See also *Neck v. Gubb* (1617), 1 Vin. Ab. 271, pl. 3; *Dartnal v. Morgan* (1620), Cro. Jac. 598.

⁴ *Clerk v. Palady* (1598), Cro. El. 859; *White v. Shorte* (1614), 1 Roll. Ab. 7, pl. 4; *Ablain's Case* (1621), Winch. 15.

⁵ *W. Jones*, 364, Cro. Car. 414, 1 Roll. Ab. 8, pl. 10, s. c.

better security of payment thereof that the lessor should have his remedy by action of debt upon the reservation, or action upon this collateral promise at his election, and this being the intent at the beginning, the making of the lease, though real, would not toll this collateral promise, as a man may covenant to accept a lease at a certain rent and to pay the rent according to the reservation, for they are two things, and so the promise of payment is a thing collateral to the reservation, which will continue though the lessee assign over." This doctrine was repeatedly recognized in the King's Bench ;¹ it was adopted in the Exchequer in 1664;² and was finally admitted by the Common Bench in *Johnson v. May*³ (1683), where, "because this had been *vexata questio* the court took time to deliver their opinion, . . . and all four justices agreed that the action lay, for an express promise shall be intended, and not a bare promise in law arising upon the contract, which all agree will not lie."

In the cases thus far considered the *assumpsit* was for the payment of a sum certain. *Assumpsit* was also admissible where the amount to be recovered was uncertain; namely, where the defendant promised to pay a reasonable compensation for the use and occupation of land. Indeed, in such a case *Assumpsit* was the sole remedy, since Debt would not lie for a *quantum meruit*.⁴

Such was the state of the law when the Statute 11 Geo. II. c. 19, § 14, was passed, which reads as follows: "To obviate some difficulties that may at times occur in the recovery of rents, where demises are not by deed, it shall and may be lawful to and for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, and hereditaments held or occupied by the defendant in an action on the case for the use and occupation of what was so held and enjoyed; and if, in evi-

¹ *Potter v. Fletcher* (1633), 1 Roll. Ab. 8, pl. 7; *Rowncevall v. Lane* (1633), 1 Roll. Ab. 8, pl. 8; *Luther v. Malyn* (1638), 1 Roll. Ab. 9, pl. 11; Note (1653), Sty. 400; *Lance v. Blackman* (1655), Sty. 463; *Hov v. Norton* (1666), 1 Sid. 279; 2 Keb. 8, 1 Lev. 279, s. c.; *Chapman v. Southwick* (1667), 1 Lev. 204, 1 Sid. 323, 2 Keb. 182, s. c.; *Freeman v. Bowman* (1667), 2 Keb. 291; *Stroud v. Hopkins* (1674), 3 Keb. 357. See also *Falhers v. Corbret* (1733), 2 Barnard. 386, but note the error of the reporter in calling the case an *Indebitatus Assumpsit*.

² *Trever v. Roberts*, Hard. 366.

³ 3 Lev. 150.

⁴ *Mason v. Welland* (1685), Skin. 238, 242, 3 Mod. 73, s. c.; *How v. Norton* (1666), 1 Lev. 179, 2 Keb. 8, 1 Sid. 279, s. c. It is probable that a promise implied in fact was sufficient to support an *assumpsit* upon a *quantum meruit*. "It was allowed that an *assumpsit* lies for the value of shops hired without an express promise," per Holt, C. J. (1701), 1 Com. Dig., *assumpsit*, C, pl. 6.

dence on the trial of such action, any *parol* demise or agreement, not being by deed, whereon a certain rent was reserved, shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of damages to be recovered."

The "difficulties" here referred to would seem to be two. If, before this statute, the plaintiff counted upon a *quantum meruit*, and the evidence disclosed a demise for a sum certain, he would be nonsuited for a variance. Secondly, if he declared for a sum certain, he must, as we have seen, prove an express promise at the time of the demise. The statute accomplished its purpose in both respects. But it is in the removal of the second of the difficulties mentioned that we find its chief significance. Thereby *Indebitatus Assumpsit* became concurrent with Debt upon all *parol* demises. In other words, the statute gave to the landlord, in 1738, what Slade's case gave to the seller of goods, the lender of money, or the employee, in 1602; namely, the right to sue in *Assumpsit* as well as in Debt, without proof of an independent express promise.

The other counts in *Indebitatus Assumpsit* being the creation of the courts, the judges found no great difficulty in gradually enlarging their scope, so as to include quasi-contracts, where the promise declared upon was a pure fiction. Thus, one who took another's money, by fraud or trespass, was liable upon a count for money had and received;¹ one who wrongfully compelled the plaintiff's servant to labor for him, was chargeable in *Assumpsit* for work and labor;² and one who converted the plaintiff's goods, must pay their value in an action for goods sold and delivered.³

But *Indebitatus Assumpsit* for rent being of statutory origin, the courts could not, without too palpable a usurpation, extend the count to cases not within the act of Parliament. The statute was plainly confined to cases where, by mutual agreement, the occupier of land was to pay either a defined or a reasonable compensation to the owner. Hence the impossibility of charging a trespasser in *assumpsit* for use and occupation.

J. B. Ames.

¹ *Supra*, 67; *Thomas v. Whip*, Bull. N. P. 130; *Tryon v. Baker*, 7 Lans. 511, 514.

² *Supra*, 68; *Stockell v. Watkins*, 2 Gill & J. 326.

³ The writer is indebted to Professor Keener for a correction of the statement (*supra*, 68) that the count for goods sold and delivered was never allowed against a converter. See 2 Keener, *Cases on Quasi-Contracts*, 606, 607, n. 1; Cooley, *Torts* (2 ed.), 109, 110; Pomeroy, *Remedies* (2 ed.), §§ 568, 569.

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To the Editors of the Harvard Law Review:—

THE HARVARD LAW REVIEW has had a kind word for the Selden Society on several occasions, and it may be willing to give a little space for some remarks concerning the Society's volume now in the press; for the present undertaking is unique.

The volume in hand deals with matter out of the regular course of the proceedings of the courts. The accomplished editor, Mr. Maitland, has turned aside from pleas in the royal courts, and gone a-field into the manors; and why? will be the natural question. The answer is, that the rolls of the manor courts throw a very special light upon much that took place in the royal courts; and not a side-light merely, valuable as that generally is; the light from the manors often begins where that of the higher courts has gone out.

I speak briefly here of matters of procedure only; though these rolls are equally instructive in regard to substantive law *ex directo*.

The procedure of the manor courts, while following the same general lines as those of the royal courts, yet ran a course of its own. It would not be necessary to remind lawyers that procedure has had much to do with important branches of the substantive law; but it is worth while to say that in these manor pleas we frequently find remarkable and unexpected illustrations of the fact. How much have the technical forms of action of trespass, debt, and covenant had to do with our modern law; and how important to know the process by which these tyrannous forms of action came into being and began their long career of dominion! The like is not to be found in contemporaneous history.

The pleas in the royal courts, and the side-light of chronicles and registers, help us much to an understanding of the matter; but often, at the point where these fail us, the pleas in the manor courts, in these very rolls, make us thankful that an editor has been found with courage to turn over the records and make them throw out their hidden light.

Your space will not permit me to go into details; but I hope you will allow me a word by way of illustration of what has been said. Whence came our action for defamation, with its troublesome allegation of malice? It has been usual as guess-work to say, from the

Court Christian, by way of the statute of Westminster Second, under which actions "on the case" arose. But in this volume of manor rolls we find many actions for defamation about the time of the statute, some, I think (I speak now from memory), before that time, with every indication that they are of old. Nor is there anything in them—and the pleadings are often given in full—that savors of the Court Christian; there is no mention of "malitia" in any of the half-dozen cases which I have had the pleasure of seeing in the proofs.

When it is added that the trial in all these cases has been by jury, and apparently by the jury of presentment of the manor, enough will have been said, I trust, to make a strong case for the present volume, and to make the members of the society (may their tribe increase!) anxious to see it. A single case in it has been worth my guinea.

MELVILLE M. BIGELOW.

CAMBRIDGE, March 4, 1889.

In the case of *People v. O'Brien*, 18 N. E. Rep. 692, recently decided in New York, and digested in the last number of the REVIEW,¹ where a statute, after abrogating the charter of the Broadway Surface Railroad Company, bestowed its franchises gratuitously upon the city of New York, on the theory that corporate property, ceasing to exist as such at the dissolution of the corporation, may be taken by the State without technically infringing any right of those previously interested therein, the court thus emphatically express themselves: "The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice, as well as the traditions of the Anglo-Saxon race in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary; and we desire, in unqualified terms, to express our disapprobation of such a doctrine."

This statement is particularly gratifying to those who remember the extravagant notions about the power of the State, current at the time of the unearthing of the frauds by which the Broadway Company procured its grant from the New York aldermen.

THE statement recently made in an editorial of a well-known newspaper that the Supreme Court of the United States "is perhaps the most original creative piece of political construction known to history,"² is an extreme expression of the common opinion that our Supreme Court was almost entirely an original creation of the framers of the Constitution; in fact, a wholly unprecedented piece of judicial machinery that sprang, as it were, full panoplied from their brains, as did Minerva from the head of Jove.

This romantic idea that the entire Constitution was thus the spontaneous offspring of the brain of its framers, expressed in Gladstone's famous saying, that "the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man," has been gradually shrinking away under the light of historical investigation, until at present the still undisputed romance attached to the

¹ [P. 335].

² The Boston Post, Jan. 24, 1889.

creation of the Supreme Court is the greater part of the small remnant of what was once so great a whole. Modern historical research, however, which cares little for hero-worship or for romance, and which insists that political institutions, like living organisms, are as a rule developed from earlier institutions by a process of selecting and adopting those features which experience has proven to be best adapted to the needs of the political environment, is fast demonstrating that even the lingering bit of poetical statement as to the origin of the Supreme Court will scarcely bear the light of careful investigation.

It is true that De Tocqueville, who wrote in the days of hero-worship and historical romance, pronounced a dictum looking towards the theory of supernatural origin. So, also, Sir Henry Maine has more recently written, that the Supreme Court of the United States is "a virtually unique creation of the founders of the Constitution," an experiment with "no exact precedent for it, either in the ancient or modern world." But then he added, a few lines further, that, "novel as was the Federal Judicature established by the American Constitution as a whole, it nevertheless had its roots in the Past, and most of their beginnings must be sought in England."¹

It seems, indeed, to be true that the case against the originality of our judicial system can be put even more strongly than it is put by Sir Henry Maine. In fact, it is somewhat strange that this idea of novelty should have spread so widely as it has done, in view of the statement made by Hamilton in the "Federalist" as to the plan of the convention for committing the judicial power in last resort to an independent court, which is the characteristic feature of our system, that, "contrary to the supposition of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia."²

After many years, in which this view has been overlooked, the historical pendulum is again swinging back to its starting-point. Thus Mr. Alexander Johnston has recently declared that the erection of the judiciary into a position as a coördinate branch of the government, which he characterizes as the great achievement of the convention, and one of the most distinguished successes of the American system, "came in, not with the Convention, but with the adoption of written constitutions by the States." This result, inseparable from the adoption of a permanent exponent of the popular will as the supreme authority by whose provisions the courts must test the validity of legislative action, "had already been obtained in eleven of the thirteen States in 1787, through their adoption of written constitutions; and the Convention, by its coincident adoption of a written constitution, and of a system of courts, copied directly the results of State experience. Indeed, the germs of the whole system may be traced far back of 1776, into colonial experience."³

So, also, Mr. James Bryce, in his recent masterly work upon "The American Commonwealth," concludes that the relation of the Federal

¹ Maine's *Popular Government*, American edition, p. 218.

² *The Federalist*, No. 81, J. C. Hamilton's ed., 598. Quoted in 2 Story on the Constitution, 4th ed., p. 392.

³ *The First Century of the Constitution*, *The New Prince. Rev.*, vol. iv., p. 182. See also another quotation from same article in Bryce's *Amer. Com.*, vol. i., p. 668.

courts to the Constitution, as established by the plan of the Convention of 1787, is "simple, useful, and conformable to general legal principles," and that although "it is, in the original sense of the word, an elegant plan," yet "it is not novel. It was at work in the States before the Convention of 1787 met. It was at work in the thirteen colonies before they revolted from England. It is an application of old and familiar doctrines. Such novelty as there is belongs to the scheme of a Supreme or Rigid Constitution, reserving the ultimate power to the people, and limiting in the same measure the power of the Legislature."¹

In short, instead of claiming that the framers of the Constitution were creative theorists of wondrous power, we must give them the juster, and perhaps greater praise, of being endowed with that supreme and uncommon sense that enables men to wisely utilize the experience of the past in building for the future. We can fitly apply to their work in the creation of our judiciary system the praise given them by James Russell Lowell: "They had a profound disbelief in theory and new forms, and knew better than to commit the folly of breaking with the past. They were not seduced by the French fallacy that a new system of government could be ordered like a new suit of clothes. They would as soon have thought of ordering a new suit of flesh and skin. It is only on the roaring loom of time that the stuff is woven for such a vesture of their thought and experience as they were meditating."²

APROPOS of Judge Cooley's address upon the subject of Written Constitutions, published in this number of the REVIEW, is the fact that the 14th of last January was the two hundred and fiftieth anniversary of the adoption of the first constitution of what is now the State of Connecticut. This document, called "Fundamental Orders," adopted at Hartford in 1639, enjoys the honor, it is said, of being the first written constitution, in the modern sense of that phrase, known to the world. That is to say, it is said to be the first document adopted by the citizens of a political community, containing permanent limitations upon the powers of the government which it created.

The preamble to this interesting document recites that "we the Inhabitants and Residents of Windsor, Harteford, and Wethersfield . . . now cohobiting and dwelling in and upon the River of Conectcotte and the Lands thereunto adioyneing . . . doe . . . assotiate and coniogne ourselues to be as one Publike State or Comenwelth; and doe, for ourselues and our successors and such as shall be adioyned to vs att any tyme hereafter, enter into Combination and Confederation together, to mayntayne and p'searue the liberty and purity of the gospell of our Lord Jesus w^{ch} we now p'fesse, as also the disciplyne of the Churches, w^{ch} according to the truth of the said gospell is now practiced amongst us; As also in o' Ciuell Affaires to be guided and governed according to such Lawes, Rules, Orders and decrees as shall be made, ordered & decreed, as followeth."³

THE recent English case of *Cann v. Willson*, 39 Ch. D. 39, digested in the present number of the REVIEW, decides that a man who care-

¹ Bryce's *Amer. Com.*, vol. i., p. 250.

² Lowell, *Democracy and other Addresses*, p. 23, cited in Bryce's *Amer. Com.*, vol. i., p. 31, note.

³ Poore's *Charters and Constitutions*, 249. Also reprinted in series of "Old South Leaflets," together with the "Fundamental Agreement" of New Haven.

lessly and recklessly makes a statement, knowing that another person intends to act upon it, and under such circumstances that the other is reasonably entitled to rely upon it, although he himself is not interested in the result of the other's action, is, in the event that the statement proves untrue, liable in damages to the other who has been injured by acting upon it, both in an action on the case for negligence, and in an action of deceit for the misrepresentation.

Recovery on the ground of negligence is based upon an analogy to those cases in which liability is fixed upon one who carelessly erects a dangerous scaffolding which he knows others are to use, or mixes dangerous ingredients in a remedy offered for public sale. So in *Cann v. Willson*, the basis of the responsibility is said to be that the maker of the statement, knowing that another person intends to act upon it, being reasonably entitled so to do, has voluntarily assumed the duty of supplying a safe and accurate statement, and is liable for negligence in the performance of this duty. The analogy seems to be a good one. Sound public policy demands the fixing of the responsibility in question.

The phrase "under such circumstances that the other is reasonably entitled to rely on his statement," though not used by the court, seems to express their doctrine as accurately as it can be defined. In the case under discussion, the defendants, a firm of valuers, were employed by a third person, with whom the plaintiff was negotiating for the mortgage of certain property, to give the plaintiff a valuation of the property. Here the plaintiff evidently was reasonably entitled to rely on the carefulness of the defendant's valuation, although there was no contract relation between him and them, and although they were not interested in his action with regard to the property. There is no reason to believe that the court would have held the defendants liable had they been mere officious volunteers giving information on which the plaintiff would not have been reasonably entitled to rely. An able critic in the January "Law Quarterly"¹ is misled in this respect, his criticism of the case as to this point being based on the mistaken ground that the valuation was given *gratis*.

Upon the point that an action of deceit can, under these circumstances, be maintained, *Cann v. Willson* goes no farther than the previous decision of *Peek v. Derry*, 37 Ch. D. 541, digested 2 H. L. REV. 189, in which the doctrine had been already established that an untrue statement, recklessly made, without reasonable grounds for believing it to be true, is, in an action for deceit, equivalent to a statement made with the knowledge that it is false. The cumulative authority of this present decision seems to firmly establish in the English law that novel, though apparently beneficial, doctrine.

It had long before been settled that in an action for deceit it was not necessary to prove that the defendant had anything to gain by his misstatement, or that he was under any contractual relation to the plaintiff. *Polhill v. Walter*, 3 B. & Ad. 114.

Modern English law is moving fast in the direction of fixing additional responsibility upon the makers of statements which are to be acted upon in dealings between man and man; it is to be trusted that the American law may keep pace with this beneficial advance.

¹ Law Quarterly Review, vol. 5, p. 101. The "Law Quarterly" contains (pp. 101-103) two interesting criticisms of *Cann v. Willson* (one written by the editor), which differ in part both from each other and from the opinions expressed in this note.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

BANKS AND BANKING — NATURE OF SAVINGS-BANK. — A savings-bank in Massachusetts is an incorporated agency for receiving the moneys of depositors in small or moderate amounts and investing them merely for the use and benefit of the depositors. The bank assumes no obligation to repay to any depositor the full amount of his deposit, and, in case of loss from an investment carefully and lawfully made, it must be borne *pro rata* by the depositors. *Lewis v. Lynn Inst. for Savings*, 19 N. E. Rep. 365 (Mass.).

COMMON CARRIERS — MALICIOUS NEGLIGENCE OF EMPLOYEE — EXEMPLARY DAMAGES. — A railway company is liable in exemplary damages for the malicious or reckless negligence of its servants, in the course of their employment, although such negligence be not authorized or approved by the company. *Quinn v. South Carolina Ry. Co.*, 7 S. E. Rep. 614 (S. C.).

COMMON CARRIERS — RAILWAY TICKET — SEPARATION OF COUPON. — Where the coupon of a railway ticket, perforated for the purpose of separation, and conditioned to be void if detached, became separated through no fault of the passenger, it was *held* that this separation was not such a detachment as would work forfeiture of the contract. *Wightman v. Chicago & N. W. Ry. Co.*, 40 N. W. Rep. 689 (Wis.).

CONFLICT OF LAWS — PUBLIC POLICY OF A STATE — ASSIGNMENTS PREFERRING CREDITORS. — A statute of S. C. provides that assignments preferring certain creditors shall be void. Such an assignment was executed in N. Y. by a citizen of N. Y. conveying personal property in S. C. *Held*, that as such assignment was contrary to the public policy of the State, it was void in S. C., though by the law of N. Y. such preference is not only permitted but required, and though none of the creditors attaching it reside in S. C. *Sheldon v. Blanvelt*, 7 S. E. Rep. 593 (S. C.).

CONSTITUTIONAL LAW — INTERSTATE COMMERCE. — Transportation by continuous carriage, from a point in one State over connecting lines which pass through another State back to a point in the original State, and one of which connecting lines lies wholly in such other State, is interstate commerce within the meaning of the Constitution of the U. S. *Sternberger v. Cape Fear & Y. V. Ry. Co.*, 7 S. E. Rep. 836 (S. C.).

CONSTITUTIONAL LAW — TONNAGE DUTY — OYSTER DREDGING. — A Maryland statute imposed a tax of three dollars per ton upon all vessels employed in dredging for oysters in the State waters. *Held*, that this was not a tonnage duty, but a lawful compensation demanded by the State, as the proprietor of the oyster beds, for the privilege of taking oysters; and that it was but reasonable that this compensation should be rated according to the size of the vessel used. *Dize v. Lloyd et al.*, 36 Fed. Rep. 651 (Md.).

CRIMINAL LAW — ASSAULT — HUSBAND AND WIFE — VENEREAL DISEASE. — A husband who, being aware that he has a venereal disease, has connection with his wife who is ignorant of his condition, and communicates the disease to her, cannot be convicted under a statute of "an assault occasioning actual bodily harm." *Reg. v. Clarence* (Cr. Cas. Res.), 59 L. T. Rep. N. s. 780 (Eng.).

Eight judges, for one reason or another, agreed in the decision; four judges dissented. Seven opinions were delivered. The principal propositions advanced by various of the majority were as follows: First, that there can be no assault by means of infection; second, that the concealment by the husband of his condition was not such fraud as vitiated the wife's consent; and third, that if fraud in question could vitiate the consent to the contamination, it would also vitiate the consent as to the intercourse, these not being separable (*Hegarty v. Shine*, 14 Cox C. C. 124, at 145), and the result would be that the husband would be guilty

of a rape upon his wife, which is impossible on account of the fundamental idea of the marriage relation (Hale's Pl. Cr. 628).

The minority, on the contrary, expressed the following various opinions: First, that there can be an assault by infection; second, that the husband's fraud vitiated the wife's consent *in toto*; and, third, that even if his fraud did not vitiate her consent as to the act of intercourse, still it did vitiate her consent as to the contamination by disease, these being separable (*Reg. v. Bennett*, 4 F. & F. 1105; *Reg. v. Sinclair*, 13 Cox C. C. 28); and that, therefore, although the husband could not be convicted of a rape upon his wife, still he could be convicted of an assault by way of infection.

Mr. Justice Stephen, who was of the majority, in discussing the application of the maxim that "fraud vitiates consent" in the similar cases of *Reg. v. Flattery*, 2 Q. B. D. 410 and *Reg. v. Dee*, 14 Ir. L. C. L. 468, said that "the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape, are frauds as to the nature of the act itself, or as to the identity of the person who does the act."

CRIMINAL LAW — HOMICIDE — IRRESISTIBLE IMPULSE. — Mere irresistible impulse, though arising from mental derangement, is not a defence to an indictment for murder, provided the accused knew that the act which he was committing was a crime, morally, and punishable by the laws. *State v. Alexander*, 8 S. E. Rep. 440 (S. C.).

This case seems to indicate a disposition on the part of our courts to do away entirely with this defence.

EVIDENCE — JUDICIAL NOTICE — RAILROAD LINES. — The court has judicial knowledge of the fact that certain railroads touch the same points, and are practically parallel, and necessarily competing, lines. *Gulf, C. & St. F. R. R. Co. v. State*, 10 S. W. Rep. 81 (Tex.).

EVIDENCE — PROMISSORY NOTE — CONDITION SUBSEQUENT BY PAROL AGREEMENT. — Evidence is admissible that a promissory note, delivered to the payee, was executed in contemplation of a proposed transaction and with a collateral oral agreement that it should become of no effect if the maker's attorney should disapprove of the transaction; and such note is rendered void upon expression of the attorney's disapproval. *Ware v. Allen*, 9 Sup. Ct. Rep. 174.

This is, it is to be noticed, the case of a condition subsequent. That it is permissible to introduce evidence of a separate oral agreement constituting a condition precedent to any liability under a written contract, see note to case of *Meekins v. Newberry*, digested in 2 HARV. L. REV. 289.

FEDERAL COURTS — JURISDICTION — DOMICILE OF CORPORATIONS. — U. S. Act, March 3, 1887, provides that an action shall be brought in no other district than that of which defendant is an inhabitant. *Held*, that a railway corporation is an inhabitant only of the State which created it, and federal courts elsewhere will not take jurisdiction of an action against it. *Filli v. Delaware, L. & W. R. Co.*, 37 Fed. Rep. 65 (N. Y.).

FEDERAL COURTS — PRECEDENTS — FOLLOWING STATE DECISIONS. — When the construction of a State constitution or statute involves no federal question, and has been settled by the decision of the highest tribunal of the State, it is a general rule of decisions in the federal courts to follow and adopt such decision; and this rule is to be followed even where the U. S. Supreme Court has given a different construction to the State law. There are, however, exceptions to this rule; first, when rights of property have been acquired under former decisions; secondly, when on the same transactions the federal court has first passed, and the decisions of the State court relied upon do not meet the independent judgment of the U. S. Supreme Court; and, thirdly, when general questions of commercial law are involved. Perhaps there is also an exception in cases involving controversies between citizens of different States. *New Orleans Water Works v. Brewing Co.*, 36 Fed. Rep. 833 (La.).

The above rule, it would seem, is discretionary, and will not be followed so strictly as to violate the demands of truth and justice. See *Gelpcke v. City of Dubuque*, 1 Wall. 175.

HUSBAND AND WIFE — HUSBAND MAY ENFORCE WIFE'S CONTRACT WITH HIMSELF. — A statute of Indiana gives a married woman a right to contract as to her personal property, and carry on her separate business as if sole, except in certain particulars. *Held*, that a husband could recover on an express con-

tract made by his wife to repay money loaned to her by him for a proper use in her separate business. But "the husband must show, not only an express contract, but also that in equity and good conscience he is entitled to enforce his claim. The contract is not valid in the sense that it can be enforced strictly as contract. This is so, because in strict law the . . . theory of the unity of person still exists." *Harrell v. Harrell*, 19 N. E. Rep. 621 (Ind.).

As to partnerships between husband and wife see *Toof v. Brewer*, 3 So. Rep. 571 (Miss.), digested 2 HARV. L. REV. 99.

INFANT — CONTRACT FOR BENEFIT OF INFANT. — An infant contracted to perform services for another, under terms beneficial to himself. *Held*, that he was bound by the contract, and an injunction was granted to prevent him from breaking its negative stipulations. "There can be no doubt that an infant may enter into a contract which is beneficial to himself, and is bound by it." *Leslie v. Fitzpatrick*, 3 Q. B. D. 229 (an action against an infant for damages arising for breach of contract), gives the correct test of the contract. Whether the provisions "are inequitable or not depends on considerations outside the contract. If such provisions were at the time common to labor contracts, or were in the then condition of trade such as the master was reasonably justified in imposing as a just measure of protection to himself, and if the wages were a fair compensation for the services of the youth, the contract is binding, inasmuch as it was beneficial to himself by securing to him permanent employment, and the means of maintaining himself." *Fellows v. Wood*, 59 L. T. Rep. N. S. 513 (Q. B. D.); s. c. 39 Alb. L. J. 76 (Eng.).

JUDICIAL SALE — FAILURE OF PURCHASER TO COMPLY WITH BID. — Where, at a sale of property under order of the court, for the benefit of creditors, a purchaser, after his bid has been accepted and the sale reported, refuses to comply with the terms of his bid, the court may, without confirming the sale to him, order a resale of the property, and after such resale enter a decree against him for the deficiency between his bid and the proceeds of the resale, with costs. *Camden v. Mayhew*, 9 Sup. Ct. Rep. 246.

JURY — METHOD OF ESTIMATING DAMAGES. — It is proper for a jury, in an action for unliquidated damages, to add together the amounts named by the several jurors, and divide the sum by twelve, and then to adopt the result as their verdict; but such method must not be made use of pursuant to an agreement to be bound by the result. *City of Kinsley v. Morse*, 20 Pac. Rep. 222 (Kan.); *Hunt v. Elliott*, 20 Pac. Rep. 132 (Cal.).

The propriety of recommending such a proceeding to the jury is briefly discussed in *Thomas v. Dickinson*, 12 N. Y. 364, 372.

LIEN — CONSTRUCTIVE TRUST — MINGLING OF FUNDS. — Defendant, having innocently received money paid him by the plaintiffs through mistake and mingled it with his own, spent a part of the whole amount and bought land with the remainder. *Held*, that "a constructive trust would arise upon the land, had the transaction been between citizens of the United States," but that the plaintiffs, being aliens, could not, under the laws of Texas, claim a resulting or constructive trust in the land, but were entitled to a lien on the land for the amount furnished. *Zundell et al. v. Gess*, 9 S. W. Rep. 879 (Tex.).

It would seem notwithstanding the *dictum* of the court, that, under the circumstances of the case, if the plaintiffs had been citizens they would have been entitled to no more, for it does not appear that there was any *wrongful* dealing with the plaintiffs' property from which the law could raise a trust in the strict sense of the word.

NEGLIGENCE — DECEIT — MISREPRESENTATION — CARELESS STATEMENTS. — The solicitors of the plaintiff, the intending mortgagee of property, required the owner to obtain a valuation of the property. The owner employed the defendants, a firm of valuers, who, knowing the purpose for which the valuation was to be used, carelessly fixed a value, which they had no reasonable ground to believe to be correct, and informed the plaintiff's solicitors of their valuation. The plaintiff, acting on the advice of his solicitors, and induced by the representations of the defendants, advanced money upon the security of a mortgage of the property. The mortgagor having defaulted in payment, and the property proving to have been greatly overvalued, and insufficient to answer the mortgage, it was *held* that the plaintiff could recover from the defendants for the damage sustained by him. The decision was put on two grounds, entirely independent

of a contract relation: first, that under the authority of *Heaven v. Pender*, 11 Q. B. D. 503, and *George v. Skivington*, L. R. 5 Ex. 1, the defendants having knowingly put themselves in the position of furnishing the plaintiff a document, called a valuation, upon the basis of which he was to act, incurred, in point of law, a duty towards him to use reasonable care in its preparation, and were liable to him for negligence in the performance of this duty; and, secondly, that, on the authority of *Peck v. Derry*, 37 Ch. D. 541 (digested 2 HARV. L. REV. 189), when a man makes an untrue statement to another, with an intention that it shall be acted upon, and without reasonable grounds for believing it to be true, he is liable in damages, in an action for deceit, to the person acting on his statement. *Cann v. Willson*, 39 Ch. D. 39; s. c. 59 L. T. Rep. N. s. 723 (Eng.).

For discussion of this case see note *supra*, in present number of the REVIEW.

NOVATION. — The assent of the creditor is a necessary element in the substitution of a new for an old debtor. To constitute such a novation there must be a mutual agreement between all three parties, whereby at the same time the old debt is extinguished and the new debt is created. *Cornwell v. Megins*, 40 N. W. Rep. 610 (Minn.).

PARTNERSHIP — INFANT PARTNER. — Firm property may be held for the debts of a firm although one of the partners is an infant; but the infant may repudiate all personal liability on the firm debts. *Pelletier v. Couture*, 19 N. E. Rep. 400 (Mass.).

This decision seems to recognize that, so far as responsibility for debts is concerned, the firm is an entity distinct from the individual partners, who may or may not have the capacity to incur personal liability.

PATENTS FOR INVENTIONS — DURATION — PRIOR FOREIGN PATENTS. — U. S. Rev. St., § 4887, provides that every patent for an invention previously patented in a foreign country "shall expire at the same time with the foreign patent," and shall not remain in force more than seventeen years. Act Canada, 1872, permits the holder of a five-year patent to obtain, as a matter of right, on payment of a fee, two subsequent extensions, of five years each. A Canadian patent for five years having been granted on an invention, a United States patent was granted on the same invention for seventeen years. The Canadian patent was subsequently renewed for the two additional terms of five years. *Held*, the fifteen-years term of the Canadian patent having been continuous, that the United States letters-patent continued valid during its entire duration, and expired at the end of the fifteen years.

Blatchford, J.: Although "the United States patent may on its face run for seventeen years from its date, it is to be so limited by the courts, as a matter to be adjudicated on evidence *in pais*, as to expire at the same time with the foreign patent, not running in any case more than seventeen years; but, subject to the latter limitation, it is to be in force as long as the foreign patent is in force." *Bate Refrigerating Co. v. Hammond Co.*, 9 Sup. Ct. Rep. 225.

This decision overrules various Circuit Court cases cited in the opinion.

QUASI CONTRACT — MONEY PAID UNDER MISTAKE OF FACT — STATUTE OF LIMITATIONS — DEMAND. — When a bank, upon which a check is drawn payable to a particular person, pays the amount of the check to one presenting it with a forged indorsement of the payee's name, both parties supposing the indorsement to be genuine, the right of action of the bank to recover back the money from the person so obtaining it, accrues immediately upon payment of the money, without a demand for its repayment, and is barred within six years from that date by a statute limiting actions on contracts and obligations, express or implied. *Leather Manufacturers' Nul. Bank v. Merchants' Bank*, 9 Sup. Ct. Rep. 3.

For the contrary view, that where money has been paid under a mutual mistake of fact, no right of action accrues until a demand has been made for its repayment, see, in addition to the cases discussed in the above opinion, the case of *Freeman v. Jeffries*, L. R. 4 Ex. 189; s. c. 1 Keener's Cases on Quasi Contracts, 416; also Prof. Keener's article on "Recovery of Money Paid under Mistake of Fact," 1 HARV. L. REV. at p. 218.

REAL PROPERTY — RULE AGAINST PERPETUITIES — EVIDENCE THAT WOMAN IS PAST CHILDBEARING. — Where, in a will, a gift to the testator's great-grandchildren is, on its face, void for remoteness, evidence is not admissible to show that at the time of the testator's death his daughter was over sixty years of age, and past the age of childbearing, so that the gifts to her great-grandchildren must, as a matter of fact, vest within the time required by the Rule against Perpetuities. *Re Dawson; Johnston v. Hill*, 59 L. T. Rep. N. s. 725 (Eng.).

This decision follows *Jee v. Audley*, 1 Cox, 324, and *Re Sayers' Trusts*, L. R. 6 Eq. 319, and overrules the later case of *Cooper v. Laroche*, 17 Ch. D. 368. See also, in accord with the present decision, Gray on Perpetuities, §§ 215, 215a, in which these cases are discussed, and the rule laid down that, "for the purpose of determining questions of remoteness, men and women are deemed capable of having issue so long as they live."

REAL PROPERTY—TENANCY BY ENTIRETY—STATUTES RELATING TO MARRIED WOMEN.—The statutes which allow a married woman to own separate property do not change the common-law rule, that a deed of real estate to a man and his wife conveys a tenancy by entirety. *Baker v. Stewart*, 19 Pac. Rep. 904 (Kan.). An elaborate dissenting opinion was rendered.

STATUTE OF FRAUDS—AGREEMENT MADE IN COURT.—An agreement made in open court, and acted upon by the court, is not within the Statute of Frauds. *Savage v. Blanchard*, 19 N. E. Rep. 396 (Mass.).

STATUTE OF LIMITATIONS—ADVERSE POSSESSION—COLOR OF TITLE.—Color of title is not such adverse possession as will bar, under the Statute of Limitations, an action of ejectment. *Turner v. Stephenson*, 40 N. W. Rep. 735 (Mich.).

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—NOTICE.—Action by the receiver for delay in delivering the following message: "Willie died yesterday evening at six o'clock; will be buried at M., Sunday evening." *Held*, that, in the absence of notice to the operator, damages must be limited to the injury that would naturally and apparently result from delay in sending such a message, and that injury to fraternal feelings cannot be taken into account, there being nothing in the message to show that the receiver was the brother of the deceased. *Western Union Tel. Co. v. Brown*, 10 S. W. Rep. 323 (Tex.).

The general right of the receiver to recover for damages resulting from delay has been universally allowed in this country and denied in England. (Gray on Telegraphs, §§ 72, 73.)

The case is opposed to the general rule that for mental anguish alone a party cannot recover either in tort or contract (Wood's *Mayne on Damages*, 1st Am. ed., § 54, n.), but follows earlier Texas decisions. *Relle v. W. U. T. Co.*, 55 Tex. 308. See, however, *contra*, *Russel v. W. U. T. Co.*, 19 N. W. Rep. 408.

TROVER—REMOVAL OF GOODS BY TEAMSTER IN GOOD FAITH.—Plaintiff hired a room and left goods there without fastening the door. Defendant, a job teamster, in good faith removed the goods under the direction of the owner of the house, and delivered them to the latter at another place. *Held*, that defendant was not liable for conversion. It is settled that whoever receives goods from one in actual, though illegal, possession, and restores them to such person, is not liable. The principle may be extended to the present case, where the goods were received from one having apparent control, accompanied with capacity of investing himself with actual physical possession. *Gurley v. Armstead*, 19 N. E. Rep. 389 (Mass.).

TROVER—WAREHOUSEMAN—COURSE OF BUSINESS.—A warehouseman who receives mortgaged goods for storage, and afterwards delivers them to a third person, on production of the warehouse receipt, is liable to the mortgagee, whose mortgage is recorded in another county, although he has no notice of the claim. *Hudmon v. DuBose*, 5 So. Rep. 162 (Ala.).

In England, "a merely ministerial dealing with goods at the request of the apparent owner having actual control of them, is not conversion." Pollock, *Torts*, 293; *Greenway v. Fisher*, 1 C. & P. 190 (Packer); *Hollins v. Fowler*, L. R. 7 H. L. 757, at 767-8, *semble*.

TRUSTS—CHARITABLE TRUSTS—EFFECT OF CHURCH LAWS AND CANONS.—Archbishop Purcell, of Ohio, in 1879 made an assignment, in his individual capacity, of all his property for the payment of his debts, expressly excepting all property held by him in trust for others. Certain property was vested in him to hold according to the laws and canons of the Roman Catholic Church for the use of priests and their congregations, schools and their teachers, for sisters of charity and orphans in their charge, together with certain land for use as burial-places. None of the beneficiaries were incorporated societies, and they were constantly changing; moreover, the Archbishop, without opposition from any one concerned, had frequently exercised acts of dominion over property so coming to him, both selling and substituting other property. *Held*, that there

was a valid trust for proper purposes. The unincorporated bodies mentioned, although their membership was constantly changing, were sufficiently identified as *cestuis*, and they were properly represented by prominent members, suing in behalf of themselves and others. The nature of the Archbishop's interest was permitted to be shown by the laws and canons of the church, although some of them ran back for fifteen centuries. *Mannix v. Purcell*, 19 N. E. Rep. 572 (Ohio).

WILLS — ATTESTATION. — In New York, either an attesting witness to a will must see the testator sign his name, or the testator, exhibiting the signature to the witness, must acknowledge it to be his. Consequently an attestation is insufficient, if the will is so folded that the witness cannot see the signature, although the testator acknowledges the instrument to be his last will and testament. *In re Mackay's Will*, 18 N. E. Rep. 433 (N. Y.).

WILLS — MENTAL CAPACITY OF TESTATOR. — A testator is mentally competent if he have mind enough to understand the nature of the transaction in which he is engaged, and be mentally capable of recollecting the property which he means to dispose of, the objects of his bounty, and the manner in which he wishes to distribute it among them. *Kerr v. Lunsford*, 8 S. E. Rep. 493 (W. Va.).

REVIEWS.

AMERICAN CONSTITUTIONAL LAW. By J. I. Clark Hare, LL.D. In two volumes. Little, Brown, & Co., Boston, 1889. 8vo. Pages 1,400.

No apology is needed for a new work on constitutional law, for however able the past treatises have been, the subject is one of such constant development that the method of annotation is unsatisfactory. The recent cases are too important to be summarized in a foot-note. The book before us has the additional interest of coming from the pen of Judge Hare, for whatever the learned author of "Contracts" has to say is sure to be suggestive. As far as the substance of the work is concerned, the result is not disappointing. It contains an astonishing mass of material gleaned from every field of constitutional history. The work deserves particular mention for its suggestive, although sometimes disproportioned, treatment of some of the distinctively modern problems. Such is Lecture XIX., on Civil-Service Reform and the Primary System. Every here and there, also, a little note or some side remark opens up a broad field of thought in a manner somewhat diffuse, but, on the whole, invigorating. It can fairly be said that in breadth, in learning, and in suggestiveness the work is a valuable contribution to the subject.

It is to be regretted, however, that the form in which the work is presented is by no means equal to its substance. It seems to suffer from a lack of method, brought about in part, perhaps, from the unwieldy mass of material. The different lectures have no distinctive titles, so that it is sometimes difficult to tell at a glance what the main thread of the lecture is about. The divisions of the subject are not always clearly treated as a whole, although the remarks on individual cases are acute and discriminating. An example of this is the commerce clause, a subject which more than any other seems almost to demand a chronological arrangement to show its development. After a treatment of *Gibbons v. Ogden*, in which it is hard to see just where

the quotations from the case end and the comments begin, the author takes up treaties, then internal commerce and trade-marks. Police power is touched on twice, — at page 454, and again in the following chapter. The same is true of ferries. The result is that, however clear may be the idea of individual cases, it is difficult to trace the history of the commerce clause, or to formulate just what the present condition of the law is, and in so far the usefulness of a work, otherwise admirable, is impaired. The volumes are printed in a thorough way, and the index, so far as we have been able to examine it, is satisfactory.

G. R. N.

THE MERCANTILE LAW OF ENGLAND AND THE UNITED STATES. By John William Smith, with notes by Carter P. Pomeroy. San Francisco: Bancroft-Whitney Co., 1887. 12mo. Pages xxv and 888.

We have here in compact, handy form a compendium of the laws governing the business world. The text, which is necessarily very comprehensive in its scope, is that of the third English edition, and is retained entire, with the single exception of the chapter on the Bankruptcy Acts of England. The work of the American editor, which appears to be well done, is found in the foot-notes, which collect the American and English authorities and point out the changes in the law since the text was written.

The book in its make-up is similar to "Desty on Federal Procedure" and "Newmark on Sales," published by the same house, and, like them, loses in value for want of a list of cases. The cases themselves are jumbled together under the various headings without any regard to arrangement, chronological, geographical, or otherwise. The pages occasionally show inaccurate proof-reading. There is a good index and table of contents, however, and the division of the text into sections is a valuable improvement over the original edition. We think, on the whole, the profession will find the work a serviceable assistant.

W. F. B.

THE WORK OF THE ADVOCATE. A practical treatise, containing suggestions for preparation and trial. By Byron K. Elliott and William F. Elliott. Bowen-Merrill Co., Indianapolis, 1888. 8vo.

A book so novel in its conception and complete in its execution cannot fail to be of interest to the profession. Though many cases are cited incidentally, it does not profess to be a law book in the strict sense of the term, but rather a book about the practice of law in and out of court. Beginning with the chapter "Learning and Preparing the Facts," the author discusses at length all the different stages of the case, from the time the client enters the office until the last appeal is taken, making practical suggestions at each step, and citing cases in support of the rules of law most likely to be called into use. It treats largely of those things which must always be governed by the tact of the advocate in each case; yet a careful perusal of it would at least serve to put one on his guard when dealing with a wary antagonist. While no book can teach sagacity, "The Work of the Advocate" shows one the importance of this trait in the practising attorney. It will be found especially valuable to the younger members of the profession who desire to learn the practical side of the law as distinguished from the theoretical.

C. M. L.

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